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043
No. 2876

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE NORMA MINING COMPANY,
Appellant,
vs.
HUGH MACKAY,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District
of Arizona.

Filed

JAN 5 - 1917

F. D. Monckton,
Clerk.

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Circuit Court of Appeals
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of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States for the
District of Arizona.*

IN EQUITY.

NO. E-6—PRESCOTT.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMAN MINING COMPANY,

Defendant.

Bill of Complaint.

To the Honorable Judge of the District Court of the
United States for the District of Arizona.

Hugh Mackay, a citizen of the State of Colorado,
brings this, his Bill of Complaint against the Norma
Mining Company, a corporation, created, organized
and existing under and by virtue of the laws of the
State of Arizona, and a citizen of said State.

FOR A FIRST CAUSE OF ACTION ALLEGES:

I.

That the plaintiff, Hugh MacKay, is a resident and
citizen of the State of Colorado, residing in the City
and County of Denver, in said State.

II.

That the defendant, The Norma Mining Company,
during all of the times and at all of the dates herein-
after mentioned was, has since continuously been
and now is, a corporation created, organized and ex-
isting under and by virtue of the laws of the State
of Arizona, and is a citizen and resident of said

State, as its statutory agent William G. Blakely, whose residence is at Kingman, in the County of Mohave, in the State of Arizona. [1*]

III.

That the defendant, The Norma Mining Company, for a valuable consideration, executed and delivered to the plaintiff on the 2d day of August, A. D. 1913, its promissory note for the principal sum of Sixteen Thousand Dollars (\$16,000), which said promissory note is in words and figures following, to wit:

“\$16,000. Denver, Colo., Aug. 2d, 1913.

Four months after date The Norma Mining Company promise to pay to the order of Hugh Mackay Sixteen Thousand Dollars at Denver, Colo.

Value received with interest at six per cent per annum.

THE NORMA MINING COMPANY,

By R. T. ROOT,

President.”

IV.

That at the time of the delivery of said promissory note and to secure the payment of the said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, the defendant, The Norma Mining Company, duly executed and delivered to the plaintiff its mortgage deed, bearing date the 2d day of August, A. D. 1913, granting, selling and conveying unto the plaintiff, his heirs and assigns, certain premises described as follows:

The following patented mining claims, situate,

*Page-number appearing at foot of page of original certified Transcript of Record.

lying and being in the Indian Secret Mining District, in the County of Mohave, and State of Arizona, viz: The Putman, The Review, the West Half of The Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Aquarius, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R., The Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The Hillside, The Center, The Little Giant, The Midway, The Prince Albert, The Orient, The Squattum, The Horn Silver, The Rip Van Winkle, The African, The Norma, The Garfield, The Schaefer's Treasure, The Fraction Quartz, The Emma, The Nellie Blye, The Occident, The Junction, The G. A. R., and the Daisy Mining Claims, together with the mill and machinery therein and the different hoisting plants upon the property. [2]

V.

That said mortgage was conditioned that if the interest or the principal of said promissory note shall not be punctually paid when the same shall become due as in said promissory note mentioned, then and in such case the principal sum of said note and the interest thereon shall be deemed and taken to be wholly due and payable and proceedings may forthwith be had for the recovery of the same, either by suit on said note or on said mortgage and note.

VI.

That said mortgage was further conditioned that in any suit or other proceeding that may be had for the recovery of said principal sum and interest thereon, it would be lawful for the mortgagee, the plaintiff herein, his heirs, executors, administrators or assigns to include in the judgment that may be recovered reasonable attorneys' fees.

VII.

That said mortgage was duly acknowledged and was recorded in the office of the recorder of the County of Mohave, in said State of Arizona, on the 29th day of August, A. D. 1914, in Book 4 of Mortgages at pages 172, 173 of the records in said office.

VIII.

That the plaintiff is now the lawful owner of said promissory note and mortgage.

IX.

That default has been made in the payment of the principal and interest of said promissory note and no part thereof has been paid.

X.

That the sum of one thousand dollars (\$1,000.00) would be a reasonable amount to allow to plaintiff as attorneys' fees to be included in the judgment herein. [3]

XI.

That the plaintiff has no adequate remedy at law in the premises and can have appropriate relief only in a court of equity where matters of the nature set forth in this bill are properly cognizable and relievable.

AND FOR A SECOND CAUSE OF ACTION
ALLEGES:

I.

That the plaintiff, Hugh Mackay, is a resident and citizen of the State of Colorado, residing in the City and County of Denver in said State.

II.

That the defendant, The Norma Mining Company, during all of the times and at all of the dates herein-after mentioned was, has since continuously been and now is a corporation created, organized and existing under and by virtue of the laws of the State of Arizona and is a citizen and resident of said State, having as its stationary agent William G. Blakely, whose residence is at Kingman in the County of Mohave in the State of Arizona.

III.

That the defendant, The Norma Mining Company, for a valuable consideration, executed and delivered to the plaintiff on the 31st day of March, A. D. 1914, its two promissory notes for the aggregate principal sum of five thousand dollars (\$5000.00), which said promissory notes are in words and figures following, to wit:

“\$3500 Denver, Colo., March 31st, 1914.

On or before May 1st, 1914, after date, it promise to pay to the order of Hugh Mackay Thirty-five Hundred Dollars at seven per cent interest per annum.

Without defalcation, for value received.

THE NORMA MINING CO.

By R. T. ROOT,
President.” [4]

“\$1500. Denver, Colo., March 31st, 1914.

On or before May 1st, 1914, after date, it promise to pay to the order of Hugh Mackay Fifteen Hundred Dollars at seven per cent interest per annum.

Without defalcation, for value received.

THE NORMA MINING CO.

By R. T. ROOT,
President.”

IV.

That at the time of the delivery of said notes and to secure the payment of the principal and interest thereof as therein mentioned according to their tenor, the defendant, The Norma Mining Company, duly executed and delivered to the plaintiff its Mortgage Deed, bearing date the 31st day of March, in the year one thousand nine hundred and fourteen, granting and releasing unto the said plaintiff, and to his heirs and assigns forever all the following described patented mining claims situate, lying and being in the County of Mohave and State of Arizona, to wit:

In Indian Secret Mining District in said Mohave County, Arizona, viz.: The Putman, The Review, the West Half of the Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Acquariuas, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R., the Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The Hillside, The

Center, The Little Giant, The Midway, The Prince Albert, The Orient, The Squattum, The Horn Silver, The Rip Van Winkle, The African, The Norma, The Garfield, The Schaefer's Treasure, The Fraction Quartz, The Emma, The Nellie Blye, The Occident, The Junction, The G. A. R., and The Daisy Mining Claim; together with all the dips, spurs, and angles, and all the metals, ores, gold and silver bearing quartz, rock and earth therein, the old dump now thereon, and together with the mill and machinery therein and the different hoisting plants on the property.

V.

That said mortgage was conditioned that the defendant pay unto the plaintiff, his executors, administrators or assigns, the sum of money mentioned in said promissory notes with interest thereon and if default be made in the payment of any part thereof that the plaintiff shall have power to sell [5] the premises according to law.

VI.

That default has been made in the payment of the principal and interest of said promissory notes and no part thereof has been paid.

VII.

That the plaintiff is now the lawful owner of said promissory notes and mortgage.

VIII.

That the plaintiff has no adequate remedy at law in the premises and can have appropriate relief only in a court of equity where matters of the nature set

forth in this bill are properly cognizable and relievable.

WHEREFORE plaintiff prays:

a. That the said mortgages made by the defendant, The Norma Mining Company, to the plaintiff, Hugh Mackay, may be foreclosed as against the said defendant, the Norma Mining Company, and all persons claiming by, through or under it.

b. That an accounting be had and taken of all of the property and assets of whatsoever kind or character subject to the lien of said mortgage and that said mortgages may be decreed to be valid liens upon all property covered thereby and therein mentioned and described or intended so to be and that the amounts due and unpaid for the principal of and interest upon said promissory notes may be ascertained and determined.

c. That the plaintiff have judgment against the defendant, The Norma Mining Company in the sum of twenty-one thousand dollars (\$21,000) with interest on sixteen thousand dollars (\$16,000) from the 2d day of August, A. D. 1913, and on five thousand dollars (\$5,000) from March 31, A. D. 1913, for attorneys' fees and for costs of suit. [6]

d. That the usual decree may be made for the sale of said mortgaged premises according to law and the practice of this court and the proceeds applied in payment of the amount due to the plaintiff.

e. That the plaintiff may become a purchaser at said sale and that the purchaser be let into the possession of the said premises.

f. That the defendant, The Norma Mining Company and all persons claiming under it, subsequent to the execution of said mortgages upon said premises, either as purchasers, encumbrancers or otherwise, may be barred and foreclosed of all right, claim or equity or redemption in the said premises and every part thereof and that the defendant may be adjudged to pay any deficiency which may remain, after applying all the proceeds of the sale of said premises properly applicable thereto after the payment of the costs of foreclosure and reasonable attorneys' fees to be fixed by this Honorable Court.

g. That the defendant, The Norma Mining Company, may be required to appear and answer this Bill of Complaint according to the rules and practice of this Honorable Court.

h. And that the most gracious writ of subpoena of the United States of America be directed to the said defendant, thereby commanding it at a certain time and under certain pain therein to be specified to be and appear in this honorable court and then and there to answer all and singular the premises and stand to and abide such Order and Decree herein as to this Honorable Court shall seem meet.

A. C. BAKER,

ALEXANDER B. BAKER,

Solicitors for Plaintiff, 317 Fleming Building, Phoenix, Arizona. [7]

State of Colorado,

City and County of Denver,—ss.

Hugh Mackay, being first duly sworn, upon oath deposes and says, that he is the plaintiff named in

the foregoing Bill of Complaint; that he has read the same and knows the contents thereof and that the same is true of his own knowledge.

HUGH MACKAY.

Subscribed and sworn to before me this 28th day of December, A. D. 1914.

My Commission expires September 12, 1917.

[Seal]

RENA A. WOLZ,

Notary Public.

[Endorsements]: No. E-6 (Prescott). The District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. Norma Mining Company, Defendant. In Equity Bill of Complaint. Filed Jan. 9, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Baker & Baker, Suite 317, 318, Fleming Building, Phoenix, Arizona, Attorneys for Plaintiff. [8]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY.

No. E-33—(PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

**The Amended Answer and Cross-Bill of the Norma
Mining Company Defendant.**

The amended answer of the Norma Mining Com-

pany, a corporation, to the bill of complaint filed in the above-entitled cause and to the first cause of action therein alleged respectfully represents and shows:

This defendant reserving all manner of exceptions that may be made to the uncertainties and imperfections of the first cause of action in said bill stated, comes and answers thereto and admits:

I.

The allegations contained in paragraphs 1 and 2 of said first cause of action.

II.

This defendant, The Norma Mining Company, denies that it made, executed or delivered the promissory note set forth in paragraph 3 of said first cause of action and this defendant denies that the president of said defendant at the time of the execution and delivery of said note was authorized [9] by the said defendant to execute the same, and this defendant alleges that if the said note was executed by the said Norma Mining Company by R. T. Root, its president, as alleged in said complaint, said execution and the conditional and limited delivery of said note, as hereinafter set out, was wholly without its authority or consent and out of the course of its regular business and without consideration to the said defendant corporation, and has never been ratified by it.

III.

This defendant denies that it made, executed or delivered to the plaintiff its mortgage deed bearing date the 2d day of August, 1913, as alleged in para-

graph 4 of said first cause of action in said bill of complaint contained, or any mortgage deed whatsoever, and that if said mortgage deed was made, executed and delivered to the said plaintiff purporting to be executed by this defendant (which this defendant denies) that such making, execution and delivery was without authority of this defendant, and that such deed was made, executed and delivered without its consent and out of the course of its regular business and without consideration to it, and has never been ratified by it.

IV.

This defendant denies that the sum of one thousand dollars (\$1,000) would be a reasonable amount to allow to plaintiff as attorney's fees to be included in the judgment herein.

This defendant, reserving all manner of exceptions that may be made to the uncertainties and imperfections of the second cause of action in said bill stated, comes and answers thereto and admits:

I.

The allegations contained in paragraphs 1 and 2 of said second cause of action. [10]

II.

This defendant, The Norma Mining Company, denies, that it made, executed or delivered the promissory note set forth in paragraph 3 of said second cause of action, or either of them, and this defendant denies that the president of said defendant at the time of the execution and delivery of said notes was authorized by the said defendant to execute the said notes, or either of them, and this defendant

alleges that if the said notes, or either of them, were executed by the said Norma Mining Company by R. T. Root, its president, as alleged in said bill of complaint, said execution and delivery of said notes was wholly without its authority or consent and out of the course of its regular business and without consideration to the said defendant corporation, and has never been ratified by it.

III.

This defendant denies it made, executed or delivered to the plaintiff its mortgage deed bearing date the 31st day of March, 1914, as alleged in paragraph 4 of said second cause of action in said bill of complaint contained, or any mortgage deed whatsoever, and if said mortgage deed was made, executed and delivered to the said plaintiff purporting to be executed by this defendant, that such making, execution and delivery was without its consent and out of the course of its regular business and without consideration to it, and has never been ratified by it.

And having fully answered the complainant's bill herein, the defendant by way of counterclaim herein, as to both the mortgage bearing date the 2d day of August, 1913, and the one of the 31st day of March, 1914, set out and referred to in the complainant's bill herein, says that it is informed and believes and therefore alleges that prior to the [11] execution of either and both of said mortgages there had been for a number of years various personal loans made between the complainant herein and the then president of this defendant, R. T. Root, the latter at times loaning the complainant money or giving him ac-

commodation checks or notes to be by the complainant negotiated for the complainant's use, and at other times the complainant advancing to said R. T. Root money or checks; that at the time of the execution of the first of said mortgages the complainant told said Root he was in great need of money, and begged him to help him by giving him some notes or securities upon which he could raise money, whereupon the said Root, without the authority or knowledge of the board of directors of this defendant, and without any consideration of any kind or nature whatsoever moving to this defendant from the complainant, or any person or corporation in his behalf, all of which was well known to the complainant at the time, executed in the name of the corporation and conditionally delivered said mortgage, at the same time taking from the complainant a receipt and agreement under and by the terms of which the said complainant acknowledged that he received the said notes and mortgage for the purpose of selling them, and from the proceeds of such sale to be made within one month, to pay checks then held by said complainant as executor of the estate of George Miller, deceased, aggregating about ten thousand dollars, which checks were signed by said R. T. Root personally, and of the proceeds of which this defendant had received no part; that by the terms of said agreement, so signed by said Mackay, he promised to return said mortgage and notes to said Root if he had not sold the same within *thirtynth* from August 2, 1913, and also promised that he would not record said mortgage unless he sold it within the said one

month, and that the net balance after paying said checks he would turn over to said Root. That the complainant did not sell said [12] note and mortgage, and this defendant on information and belief avers that contrary to his said agreement the said Mackay had caused said mortgage to be recorded and contrary to the purpose for which it was delivered is now attempting to foreclose the same and appropriate it to his own use.

This defendant is further informed and believes, and upon such information and belief avers that both said complainant and said Root well knew that neither the stockholders nor the directors of this defendant company authorized said notes and mortgage, or had any knowledge or information of the issuance of the same; yet they caused to be inserted in such mortgage a statement that the same had been authorized by the directors and stockholders of this defendant, which was contrary to the facts, as both the complainant and said Root well knew, both parties thereto fully understanding that said note and mortgage were wholly unauthorized, but the complainant insisting that it was necessary to have such a recital of authority to induce his special customer whom he named to take the paper, and that said Root could thereafter procure a ratification of his acts in the premises if the sale was made, and if he, the complainant, did not make such sale within on month, the notes and mortgage could and would be returned to said Root and cancelled, and any ratification by the corporation would be unnecessary, to

which said Root assented and the agreement was drawn accordingly.

And on like information and belief this defendant avers that since such unauthorized issuance of said note for \$16,000 and said mortgage, the said R. T. Root has paid and taken up all said checks then held by said complainant as executor, and has given and said complainant has accepted, his, the said R. T. Root's, personal notes therefor and still holds the same, and all said checks have been delivered by the complainant to said R. T. Root and cancelled. [13]

And defendant further says that as to the second and last of said mortgages and the two notes aggregating five thousand dollars by the said mortgage, purporting to be secured, it is informed and believes, and therefore avers, that said notes and mortgage was made by R. T. Root, its then president, upon personal matters and dealings between said Root and the complainant and having no relation to any business or interest of this defendant, and without any consideration moving to this defendant from the complainant or any other person or corporation in his behalf that said mortgage was executed without the knowledge or authority of the board of directors of this defendant; and as defendant avers upon information and belief, at the time the said Root conditionally delivered said two notes and mortgage purporting to secure the same upon the properties of this company, he received from the complainant a receipt by which said complainant acknowledged that he had never received from said Root two notes, one for \$3,500 and the other for

\$1,500, together with a mortgage for same, executed by the Norma Mining Company on this defendant's property in Mohave County, Arizona; that in and by the terms of said receipt so given at the time the complainant declared and acknowledged that he only received said notes for the purpose of a loan, and covenated and agreed that if a loan was not made he would return the said notes and mortgage to R. T. Root or to one of the sons of R. T. Root and that if he procured a loan on said notes he would pay the money to one of said sons; that thereafter said Mackay advised said Root that he had only been able to raise the sum of \$1,800 on said two notes, which he had paid to his son W. W. Root, and that thereafter said R. T. Root offered to repay and now stands ready to repay said \$1,800 with all interest, upon the return of said notes and mortgage, and that said Mackay refused to accept such payment or to surrender said notes and mortgages, and [14] still refuses.

And this defendant, upon information and belief, avers that at the time said two notes aggregating five thousand dollars and the pretended mortgage securing the same were conditionally delivered by said Root to the said complainant, it was fully known to the complainant, and he was so advised by the said Root, that said notes and mortgage were unauthorized by the directors and stockholders of the defendant, and the said Mackay agreed that if he did not procure a loan for said \$5,000 on the property he would return both the notes and mortgage to said Root; that this defendant is not advised

whether the \$1,800 so paid by said complainant was procured by the negotiation of one or both of said notes but avers that in any event the same does not constitute a valid obligation against this defendant.

Whatsoever may be the rights as between said Root and said Mackay as to the \$1800, said to have been paid to said W. W. Root, certain it is that this defendant never received anything for or on account of said mortgage and notes, or any or either of them, and is in nowise bound by the same or any of the terms or conditions thereof, and the attempt to use said mortgage in the manner proposed is against equity and good conscience.

And this defendant denies that it ever executed any of the obligations or instruments sued on, and avers that they and none of them are its act or deed, or constitute a valid or existing obligation of this defendant.

Wherefore this defendant asks that all of said notes and mortgages be declared void, that the complainant be required to bring the same into this court to be canceled, and to release the same of record by proper deed of release to be filed in the county where the property described therein is situate, and in default of his so doing that a commissioner be appointed by this court to execute such release in the name of the complainant herein as that this defendant may have all such other relief herein as

to your Honor may seem just and the [15] rules and practice of equity require.

THE NORMA MINING COMPANY.

By CHAS. W. HOOVER,

Vice-President.

THOS. ARMSTRONG, Jr.,

ERNEST W. LEWIS,

R. L. MORGAN,

310-315 National Bank of Arizona, Bldg.,

Phoenix, Arizona,

Solicitors for Defendant.

State of Illinois,

County of Cook,—ss.

Personally appeared before the undersigned, a notary public in and for the said County and State, Chas. W. Hoover, who, being first duly sworn, on oath says that he is the vice-president of the Norma Mining Company, Defendant, and has read the above and foregoing amended answer of said company and knows the contents thereof; that said answer is true except as to matters and things therein stated on information and belief and as to such matters this affiant believes the same to be true.

WITNESS my hand and notarial seal this 18th day of March, A. D. 1915.

[Seal]

A. G. LOVELESS,

Notary Public.

My Commission expires Oct. 10, 1915.

[Endorsements]: In Equity No. 6—Prescott. In the District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. The

Norma Mining Company, Defendant. Amended Answer and Cross Bill of the Defendant. Copy Received Mch. 31, 1914. A. C. Baker, A. B. Baker, Solicitors for Plff. Filed Mar. 31, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Thos. Armstrong, Jr., Ernest W. Lewis, R. L. Morgan, 310-315 National Bank of Arizona Bldg., Solicitors for Defendant. [16]

*In the District Court of the United States for the
District of Arizona.*

No. E-33—(PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was **ORDERED, ADJUDGED AND DECREED** as follows, viz.:

That the defendant The Norma Mining Company, a corporation organized and existing under the laws of the State of Arizona, for a valuable consideration, executed and delivered to the plaintiff, Hugh Mackay, a resident of the State of Colorado, residing in the City and County of Denver in said State, its promissory note for the principal sum of sixteen thousand dollars (\$16,000), bearing date the 2d day of August, A. D. 1913, and payable to the order of

the plaintiff, Hugh Mackay, with interest from date at the rate of six per cent per annum, and that the said defendant executed and delivered its mortgage deed of even date with said promissory note conveying to the plaintiff the hereinafter-described property to secure the payment of said promissory note with interest thereon, together with the costs and expenses of this suit and a reasonable attorneys' fee, and, [17]

That later the said defendant executed and delivered to the plaintiff its two promissory notes bearing date the 31st day of March, A. D. 1914, one of said promissory notes being for the sum of three thousand five hundred dollars (\$3,500) and the other for one thousand five hundred dollars (\$1,500), each of said notes bearing interest from date at the rate of seven per cent per annum, and that at the time of the delivery of said notes and to secure the payment of the principal and interest thereon, as therein mentioned, the defendant, The Norma Mining Company, executed and delivered to the plaintiff its mortgage deed, bearing even date with said promissory notes upon the property hereinafter mentioned and that as consideration for said two last-mentioned promissory notes, the plaintiff paid the sum of four thousand dollars (\$4,000), and that said mortgages are valid and subsisting liens against said mortgaged premises, and

That the plaintiff, Hugh Mackay, is the present owner and holder of all three of the aforesaid promissory notes, and that there is due and owing to said plaintiff from the defendant upon the first of said

promissory notes for principal and interest to this date, February 15, 1916, the sum of eighteen thousand four hundred thirty-four dollars and sixty-six cents (\$18,434.66), and that there is due and owing to the plaintiff from the defendant on the last two of said notes for principal and interest to said last mentioned date the sum of four thousand five hundred twenty-three dollars and forty-three cents (\$4,523.43), and, [18]

That the sum of one thousand dollars (\$1,000) is a reasonable fee herein for the attorney of said plaintiff, and,

That default has been made in the payment of the principal and interest of said promissory notes and the plaintiff is entitled to have said mortgages foreclosed and the property therein and hereinafter described sold and that the said mortgaged property and premises hereinafter described are so situated that they cannot be sold except as an entirety, due regard being had to the best interests of these interested in the same, and,

That the mortgaged premises mentioned in said Complaint and described as follows, to wit, the following patented mining claims situate, lying and being in the Indian Secret Mining District, in the County of Mohave and State of Arizona, viz: The Putnam, The Review, The West Half of the Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Acquarius, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The

Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R., The Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The *Mittsite*, The Center, The Little Giant, The Midway, The Prince Albert, The Orient, The Squattum, The Horn Silver, The Rip Van Winkle, The African, The Norma, The Garfield, The Schaefer's Treasure, The Fraction Quartz, The The Emma, The Nellie Blye, The Occident, The Junction, The G. A. R., and The Daisy Mining Claims, together with all the dips, spurs and angles, and all the metals, ores, gold and silver bearing quartz, rock and earth therein, the old dump now thereon, and together with the mill and machinery therein and the different [19] hoisting plants on the property be sold to raise the amount due to the plaintiff for principal, interest, costs of suit, attorneys' fees, fees and expenses of sale, subject to all taxes and assessments against said property, at public auction, to the highest and best bidder at the courthouse in the Town of Kingman in the County of Mohave and State of Arizona, by the Special Master appointed to execute this decree, after giving public notice of the time and place of said sale by publication of said notice, once a week for at least four weeks prior to said sale in at least one newspaper, printed, regularly issued and having a general circulation in said County of Mohave and State of Arizona, where the property to be sold is situated, and which notice shall describe the property to be sold, and that the Special Master making such sale may either personally or by some

person to be designated by him to act in his name or by his authority, adjourn the sale from time to time without further advertisement, but only upon the request of the plaintiff or his solicitor or by order of the Court or a Judge thereof, and,

That the plaintiff herein may become the purchaser at said sale and in case the said plaintiff shall become such purchaser and shall bid no more than the amount of this decree, he may satisfy and make good his bid by paying any balance unpaid of the costs of suit, attorneys' fees and fees and expenses of sale and delivering to said Special Master a receipt for such sum as shall equal the balance of his said bid and in case the said plaintiff shall bid more than the amount of this decree, he may make good his bid up to the amount of the decree in the manner aforesaid and the amount so bid in excess of the amount of the decree shall be paid in cash, and, [20]

That the said Special Master shall report his acts in the premises to the Court with all convenient speed and upon the sale of said premises being confirmed by the Court, shall execute his Certificate of Purchase to the purchaser, or purchasers, thereof, which Certificate shall specify and describe the property purchased by such purchaser, or purchasers, the sum bid therefor and the time when the purchaser or purchasers at such sale shall be entitled to a deed for the same if not redeemed as provided by law, and said Special Master shall file in the office of the county clerk and recorder of said county of Mohave a duplicate of such Certificate of

Purchase and out of the proceeds of said sale retain his fees and expenses of such sale after the same shall have been allowed by this court and pay to the officers of this court their costs and out of the remainder pay to the plaintiff his costs in this behalf laid out and expended to be taxed, including said attorneys' fees and the sum of twenty-two thousand nine hundred fifty-eight dollars and nine cents (\$22,958.09) together with lawful interest thereon from this date to the date of such sale or if such remainder be insufficient to pay the whole of said amount last named with interest as aforesaid, then he shall apply said remainder to the extent to which it may reach and that the plaintiff shall have a judgment docketed against the defendant for any such deficiency, and that in case said premises shall sell for more than sufficient to pay the sums hereinbefore mentioned to be paid, then he shall, after making payments as aforesaid, bring such surplus money into court without delay to abide the further order thereof, and, [21]

That Edwin F. Jones be and he is hereby designated and appointed Special Master to make the sale herein ordered and decreed and to execute and deliver a Certificate of Purchase to the purchaser or purchasers of said sale as aforesaid and a deed of conveyance to the property, the Court, however, reserving the right to appoint in term time or at Chambers another person such Special Master with like powers in case of the death or disability to act of the Special Master hereby designated or in case of his

resignation or failure to act or removal by the Court, and

That the defendant and all persons claiming or to claim through or under it be forever barred and foreclosed of and from all equity of redemption and claim in and to said premises and every part and parcel thereof if the same are not redeemed according to the law of the State of Arizona and if the same are not so redeemed, then and in that case, upon the production to the said Special Master or to his successor, duly appointed as herein provided of the Certificate of Purchase executed as aforesaid to the said purchaser or purchasers, the said Special Master or his successor shall make, execute and deliver to the said purchaser or purchasers, his or their representatives or assigns, a good and sufficient conveyance in fee simple of the said premises and property, and that upon the execution and delivery of the conveyance aforesaid, the title to the said premises and property so conveyed shall be quieted in the purchaser or purchasers against said defendant, its successors and assigns and all persons claiming by, through or under it, them or either of them and the said purchaser or purchasers or their representatives or assigns, shall be let into possession of the premises so conveyed and that the defendant [22] or any person claiming by, through or under it, who may be in possession of said premises or any part thereof and any person who, since the commencement of this suit has come into possession under it on the production of said Special Master's Deed, shall surrender possession thereof to such purchaser

or purchasers, their representatives or assigns.

Dated at Phoenix this 18th day of March, A. D. 1916.

Done by the Court.

WM. H. SAWTELLE,
District Judge.

[Endorsements]: No. E-33 (Phx.). The District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. Decree. Baker & Baker, Suite 317-318 Fleming Building, Phoenix, Arizona, Attorneys for Plaintiff. Filed Mar. 18, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [23]

*In the District Court of the United States in and for
the District of Arizona.*

E-6—PRESCOTT.

E-33—PHOENIX.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Statement of the Evidence. [23½]

Testimony of Hugh Mackay, for Plaintiff.

HUGH MACKAY testified as follows:

Direct Examination.

My name is Hugh Mackay. I reside in Denver, Colorado. I have been doing contracting at times

(Testimony of Hugh Mackay.)

and building, etc., and some mining, too. I am acquainted with Mr. R. T. Root. I knew him a good many years. Plaintiff's Exhibit "A" for identification is signed by The Norma Mining Company, by R. T. Root, president. Saw Mr. R. T. Root sign it. Got the note from R. T. Root. The signature of The Norma Mining Company, by R. T. Root, president, is attached to Plaintiff's Exhibit "B." Saw Mr. Root execute and sign it. Got the mortgage from Mr. Root. The note and mortgage has never been paid. The signature of The Norma Mining Company, by R. T. Root, president, is attached to Plaintiff's Exhibit "C." Saw Mr. Root sign it. That note has never been paid or any of the principal or interest or any part of it. I got it from Mr. R. T. Root. Plaintiff's Exhibit "D" for identification is signed by The Norma Mining Company, by R. T. Root. Saw Mr. Root sign it. Got it from Mr. Root. No part of the principal or interest has been paid on that note. Plaintiff's Exhibit "E" for identification is signed by The Norma Mining Company, by R. T. Root, president. Saw Mr. Root sign it. It is attested by W. W. Root, secretary. Got it from Mr. Root. No part of that principal or interest mentioned in that mortgage has ever been paid.

Cross-examination.

At the time I received the first note and mortgage, other papers were executed. I gave a receipt to return it. Yes, I signed Defendant's Exhibit No. 1. At the time I received from Mr. Root the second two notes and mortgages, I signed a receipt.

(Testimony of Hugh Mackay.)

I have known Mr. Root to be president of The Norma [24] Mining Company for years; that is, several years. I gave the checks to Mr. Root. That is all I can tell. I have the promissory notes executed by Mr. Root on August 25. The checks are not all here. Some of them are missing. Exhibit No. 1 refers to certain checks aggregating \$10,000. There is another check on the same bank which he gave me at the time. I refer to a check for \$750. That check was included in the transaction when it was made.

The check marked Defendant's Exhibit 3 was then introduced; also a check reading: Denver, Colorado, June 9, 1913, Colorado National Bank, pay to the order of Hugh MacKay, Ex., \$4,986.72. Signed R. T. Root, and marked Defendant's Exhibit No. 4. A check marked Defendant's Exhibit No. 5. The check marked Exhibit 6. The check marked Defendant's Exhibit 7. A check marked Defendant's Exhibit 8.

Witness then resuming, testified:

I wouldn't be sure in whose writing the word "cancelled" appears on check. Might be Mr. Root's. I received them at the same time—these notes. I think it was August 26th. There are seven notes. The endorsement is in my handwriting to all of them.

Defendant's Exhibit 16 introduced.

Witness then resuming, testified:

This check for one thousand dollars is the check that was received from Mr. Root at the time you ad-

(Testimony of Hugh Mackay.)

vanced him the thousand dollars on June 19, 1913. I expect it is. There is another check for \$750 that I gave him on that date, too.

Defendant's Exhibit 17 introduced.

Witness then resuming, testified:

I got a receipt from Mr. Root at that time. Have that receipt, I expect, somewhere. This is the receipt. [25]

Defendant's Exhibit 18 introduced.

Witness then resuming, testified:

At the same time that I received the note and the statement by Mr. Root, I executed and delivered to Mr. Root that paper.

Defendant's Exhibit 18 introduced.

Testimony of R. T. Root, for Defendant.

R. T. ROOT, called by defendant, testified as follows:

Direct Examination.

I have read the records contained in the minute-book of The Norma Mining Company. There is no record of any meeting of the directors or stockholders of The Norma Mining Company at which the mortgages which have been introduced in evidence and the notes to Hugh MacKay, complainant in the present case, were under consideration or referred to. The minutes do not show anything of the kind.

Q. Well, now, you may state, Mr. Root, whether or not these notes to Mr. MacKay and the mortgages purporting to describe them were ever authorized by The Norma Mining Company.

Objections. Answer would be a legal conclusion.

(Testimony of R. T. Root.)

The COURT.—I will sustain the objection to that question.

Exception to the ruling.

Mr. ROOT.—I have been president of The Norma Mining Company ever since its organization; and as such have been familiar with its business and the transaction of its business. I have attended all meetings that have been held of the board of directors and stockholders. This record is a true and accurate record of all the meetings ever held by the board of directors of The Norma Mining Company or its stockholders. There were three directors, two from the time of the organization until the time that this mortgage was executed. Mr. Lowry had resigned and the third one had been put in his place. He was [26] Mr. H. M. Root. I usually called the meetings of the corporation, and was present at every meeting of the corporation. I did not write and copy all the minutes, only the minutes since the resignation of Mr. Lowry, or rather since the acceptance of his resignation. His resignation was accepted in July, 1911. He had resigned sometime before by written resignation. Mr. H. M. Root acted as secretary in his place from 1911 when he quit until the time of the execution of these mortgages. Mr. W. W. Root was assistant secretary part of the time. On July 15, 1911, Mr. Lowry's resignation as secretary and director was accepted. Since the execution of these mortgages there have been some other changes in the directors. I do not want to be misunderstood. The Norma Mining Company

(Testimony of R. T. Root.)

shut down and discontinued business, I believe, in the month of August, 1910—may have run to September. The Norma Mining Company has not been engaged in any business from the time it so shut down to and including the present time. Certain checks payable to Mr. MacKay as executor and certain notes given to him in the same capacity and signed by me which have been introduced in evidence. Such as were loans of money were to me personally. The Norma Mining Company never received anything for or on account of any of the loans referred to. I deeded my farm near Boulder, Colorado, which was clear from encumbrances to Mr. Mackay, which he holds as security for my personal indebtedness to him. I do not know its present value.

Q. Mr. Root, have you your account which was marked for identification, furnished to you in 1910 by Mr. MacKay?

A. Yes, sir. (Produced.)

Mr. ALDRICH.—If the Court please, I do not wish, as my friend, Judge Baker, intimated a few minutes ago, to have any [27] accounting or attempt to have any accounting between Mr. Root, who is not a party to this case, and Mr. MacKay, or to attempt to show the state of accounts between them, and I am introducing this account in evidence, which Mr. MacKay has identified, for the restricted and sole purpose of showing that at the date of its rendition to Mr. Root he did not claim at that time that Mr. Root owed him anything and that all of the

(Testimony of R. T. Root.)

money that Mr. Root now owes him has been borrowed from Mr. MacKay since that time, and I offer it in evidence for that purpose, if the Court pleases.

Judge BAKER.—If the Court pleases, I object to it as immaterial and irrelevant. It is not pertinent to any issue in the case. It would be absolutely of no assistance at all. As I understand the proposition, it is an account rendered by Mr. MacKay to Mr. Root in his private capacity in the year 1910, and it did not propose to cover any of the indebtedness covered by the mortgages in question. It is simply an old and past account. How could that be material to any question here at all? These moneys that are involved in this mortgage have been the indebtedness of Mr. Root or the Norma Mining Company, as we contend and shall contend, to Mr. MacKay, as recently as since 1910. Not involved in this question at all.

Mr. ALDRICH.—If I can have that understood between Judge Baker and myself in the record.

The COURT.—He has already stated it. That ought to end it.

Judge BAKER.—Your Honor, this is my understanding in my objection to this matter. Of course, I am not able to state on the moment how far back these moneys embraced in this mortgage would run. I would not like to be understood here—[28] I am only speaking from the facts, or rather following the gentleman sitting there. I understood the gentleman to state that the moneys embraced in this were in this account. I do not want to be bound—if we

(Testimony of R. T. Root.)

are going into an accounting to show the origin of these moneys in these two mortgages, some of these moneys may go back of that account, so far as I know, and I cannot see that it throws any light on this question. If any of the moneys embraced in these mortgages are embraced in this account or during the time this account was running, it has all been closed up by way of these mortgages. One of these, as delivered to us, was a mortgage for sixteen thousand dollars. We imagine there is no going back of that account, and we furthermore contend that the items making up the sixteen thousand dollar mortgage are immaterial and not set forth anywhere at all in this case, that the mortgage and note settles that.

The COURT.—I will sustain the objection.

Mr. STONEMAN.—Exception.

The COURT.—Note an exception to the ruling of the Court.

Mr. ALDRICH.—You may take the witness.

Cross-examination.

I was not asked in reference to the by-laws and articles, but the minutes of the board of directors' meeting do not contain authority to execute the notes or mortgages, other than the by-laws and the articles. Outside of the by-laws and articles of incorporation—I do not say that they do. The directors of that corporation at first were Mr. Lowry, Mr. Walter W. Root and myself. Mr. Walter Root is my son. Mr. H. M. Root is my son. I was the other director and president of the corporation.

(Testimony of R. T. Root.)

The first secretary was, I believe, Mr. Lowry. On pages 12 and 13 of these minutes are in Mr. Lowry's handwriting. [29] The minute entries on page 15 and a portion of page 16 is my handwriting. I entered the minutes. It was convenient for me to do so. I do not think it was necessary. My son had been out part of the day and came back in the evening—stayed home perhaps for some time down there at times when this occurred. H. M. Root is signed to that minute entry as secretary, I think. I don't think these minute entries were made of the date they were supposed to be in this record, on July 15th, 1911. I cannot remember the date this minute entry on page 15 and 16 in this book was actually made. There was a memorandum of the meeting in which the record—the putting on record of the deed of The Norma Mining Company property, and there was a memorandum at the time and they were written a good while since then. They were not written at that time. I do not recall when they were written. They were not written, however, at that time. That meeting was held at the date it is given there. These minute entries were written up sometime afterwards. My son was going away. We held a meeting before he should go away, and on that trip he went and recorded the deed. I have a deed here in my hand that was recorded upon that trip. The date of that is the 29th of July, 1911. These minutes were not written since the commencement of this action. Some subsequent ones were, but not these. I think this minute-book was in Denver at

(Testimony of R. T. Root.)

that time, July, 1913, either in my office or at my residence, in my charge. I wrote the minute entries as they appear on page 16, dated December 26th, 1911,—same as the others, convenient for me to do so. No, it was not always convenient for the secretary to do so. He had been absent from home. He was away from home visiting friends. The minute entries as they appear on page 17 of the minute-book, [30] dated March 1st, one, and the other dated March 15th, 1915, is my handwriting. Have been keeping all the minutes of the books of the corporation. The secretary very carefully verified and certified to it. He signed his name to it. He was my son. But few meetings of the board of directors of this corporation, since its organization, were held. I do not recall the number. It is there in the book. Give me the book and I will tell you. Well, I don't recall the number. There were five—four held since the retirement of Mr. Lowry. Six meetings of the directors held from 1905 up until 1915, I believe. Mr. Lowry was secretary of the corporation at one time. I do not recall when he resigned. It was some time before his resignation was accepted. He gave a written resignation that was accepted July 15th, 1911. That appears upon this minute-book, at page 15. I made the entry, all of these, as I answered before. Mr. Lowry's written resignation I have here. Here it is.

Witness hands document to Court.

Mr. STONEMAN.—I will ask if there is any dispute as to Mr. Lowry's signature?

(Testimony of R. T. Root.)

Mr. ROBINSON.—No; we are not disputing that.

[31]

R. T. ROOT, being recalled by plaintiff, testified as follows:

The Norma Mining Company ceased operations in September, 1910. The property had been operated but a short time, comparatively—several months—possibly a year. Prior to 1910 the Norma Mining Company properties were being prospected. The company did not incur any accounts. I did personally. I paid the development of the property in my own name and paid all the expenses of operation. I was general manager of the corporation during that time, and always have been. I haven't had entire control of The Norma Mining Company during its entire existence. I operated it and run it on my own account on behalf of others. I have procured the funds and paid the expenses whether or not all of these outside expenses were incurred in my individual name. This is my signature to that instrument.

(Plaintiff's Exhibit "F" introduced.)

I did not charge up to anybody the outlay and expenses that I paid for the operation of the Norma Mining Company prior to 1910, or since 1910. I kept a record of some expenses, but I do not recall to have made any charge. I keep no account between myself of the expenses that I paid in the operation of the Norma Mining Company and the company. I claim and hold no account against the Norma Mining Company in the sum of about \$30,000,

(Testimony of R. T. Root.)

for expenses and outlays in behalf of the company. The Norma Mining Company is not indebted to me in any sum for outlays and expenses in July, 1913. It was expenses on the property, not the company, for the development of the property. There was parties interested whose money I used, I procured and used on the property, opening the property. I refer to my wife; she had furnished money which was used. She had the money; a portion of it was from the sale of property that was in her name. My wife owns shares in the corporation, two certificates, one for 149,999 shares, the other for [32] 149,998 shares. These shares were issued to my wife at the time the stock was issued, after the incorporation of the company; I do not recall the date. I couldn't begin to tell you what my wife paid for those certificates; I do not recollect, it is a long time ago. The certificates were issued to Mr. E. G. McDermott and transferred to her. Mr. McDermott was in my employ. The certificates were assigned to her by McDermott at the time of the issue of the certificates. Those certificates are now held in trust by a trustee. I have not got the certificates present in court. There was not a meeting of all the stockholders and all the directors of The Norma Mining Company held in the office of Mr. F. W. Lowry, in Denver, Colorado, between the 19th and 22d of July, 1913, that is, of all the directors and stockholders. There was no meeting in the office of Mr. Lowry at Denver, Colorado, either on July 19th or July 22d, 1913, at which Mr. Lowry, Mr. Walter Root, my son,

(Testimony of R. T. Root.)

and Mr. MacKay were present. A meeting of the stockholders and directors of the company was not then held, nor a resolution passed and adopted, neither was there a meeting at that time when the shareholders and directors adopted a resolution authorizing a mortgage to be executed by me for the sum of \$25,000 on The Norma Mining Company, reciting that a mortgage be executed in favor of Mr. MacKay and reciting that The Norma Mining Company was indebted to me in the sum of twenty-five or thirty thousand dollars, and that in satisfaction of that claim of mine against the company that a mortgage be authorized to be executed by me in the sum of \$25,000 to Mr. MacKay. I was not present at any such meeting, and there was no such action. At no such meeting did I have all the shares of the corporation in my possession that had been issued up to that time, and did not announce to the meeting that I was the owner of all those shares, and that those shares were signed in blank on the back, and did not say I was the owner of all the shares and that I had [33] the power to authorize the mortgage. I did not have the shares which had been issued to my wife in my possession, signed in blank. I don't know whether Mr. Lowry was secretary of the meeting or not, but I know he was not secretary of the company, neither was he an officer of the company at that time. I never in my life heard of such a meeting in July, the 19th or 22d; never heard of it and, therefore, did not receive anything from Mr. Lowry about it. "This instrument is hereby executed and

(Testimony of R. T. Root.)

delivered by R. T. Root as president, by order of the board of directors of this company, and said execution and delivery is duly ratified by meeting of the stockholders of the company adopted, all shares issued was represented and unanimously voted in favor thereof." The explanation of the above statement in the mortgage that I executed is this: There was no delivery of the paper, except only as a possession to show if it could be procured, if it could be sold, that all these matters could be procured. If they could not be procured, then it could not be sold. The recitation was this way true if it would be made, if that was used, that was the only way to deliver or arrange paper signed and arranged for that purpose. At the time of the execution of this mortgage, the board of directors or stockholders did not order the issue of the mortgage. It was not delivered. It was not false. I am willing to sign an instrument of that kind, instrument duly authorized by the board of directors. It was not to be entirely connected by delivery, though, without being complied with. I don't recall who dictated this mortgage. This mortgage, \$16,000 mortgage, was delivered conditionally to Mr. MacKay to be sold by Mr. MacKay, and a purchaser to be procured, when it should be put in shape as the paper stated. A purchaser was not procured. The recitation in the second mortgage for \$5,000, the same as the first, was conditioned, plainly, that it be done if this was sold. It was never executed, never delivered. [34] It was a paper made to be finished; that part of it

(Testimony of R. T. Root.)

was to be done afterwards with the paper, otherwise it was not to be delivered. The first mortgage was never sold. It was conditionally delivered to Mr. MacKay and never returned to me. I think the date of that mortgage is August 2, 1913. "There is a mortgage by aforesaid grantor to aforesaid grantee on said property, \$16,000, and some taxes, all of which the grantor will pay." The above recitation was simply so that Mr. MacKay could procure the whole sum. If not, procure it in two amounts, and if it was procured all of it, that the company would be arranged with, and if it was not arranged with them it would be withdrawn, it couldn't go through. I executed this instrument with that clause in it for the purpose that this should be the same as the other, the condition the same, and the other was to be arranged and the money procured as well. I did not demand the return of the first mortgage as he was still making an effort to sell it, and that continued right along. The first mortgage was long overdue. Mr. MacKay was endeavoring to sell it as his time for selling the mortgage had been extended.

Redirect Examination of Mr. Root.

I don't remember how long after the organization of The Norma Mining Company the stock was issued. I think it could be ascertained. My wife had connection with the property at an earlier date. I have part of the location notices and the deeds to her of the property or certified copies.

(Subject postponed until papers procured.)

(Testimony of R. T. Root.)

Mr. Lowry stated to me that he desired to resign at the time of the death of Mr. Moffett. Some year or so prior to that he spoke about resigning at the time of Mr. Moffett's financial embarrassment. He handed me his resignation a considerable time before that. [35]

R. T. ROOT, on redirect examination, testified as follows:

Before he talked to me about it—held to be accepted at any time. His resignation was handed to me before Mr. Moffet's death. Quite a time before Mr. Moffit died, Mr. Moffet died in March, 1911. There was an extension asked for or granted to Mr. Mackay of the time within which he could sell this mortgage. I have a copy of a telegram that I sent. I have a copy of it here. Letter marked Defendant's Ex. 22, received by me in the due course of mail after that date. The mortgage was never given to him as security but was given to him for selling only. At various times Mr. Mackay applied to me for leave to have the mortgage recorded. I always told him not to record it. The request Mr. Mackay made with [36] reference to recording the mortgage was verbal and I think I have letters also. The letters purporting to be signed by H. Mackay, bearing date, February 12th, 1914, and addressed to me I received in the due course of mail from Mr. Mackay. I have a copy of the telegram referred to in this letter. This is a copy of the telegram referred to, marked Defendant's Exhibit 24. This H. M. R. here is my son. I do not know where the

original is. I have never seen it since I sent it to him. The original telegram signed, H. Mackay, under date of February 10th, 1913 was received.

Introduced and read in evidence.

Witness then resuming, testified: The letter purporting to be written by Mr. Mackay, dated August 9th, 1913, was received in the due course of mail. The letter purporting to be signed by Mr. Mackay, dated September 6th, 1913, was received in the due course of mail.

Introduced and read in evidence.

Witness then resuming, testified: The letter dated August 27th, 1914, purporting to be signed by Mr. Mackay and addressed to me was received in the due course of mail.

Introduced and read in evidence.

Witness then resuming, testified: Those certificates have been in Mrs. Root's possession up until the time the trustees had them. I do not recall I have had them. I first told Mrs. Root that I had put a mortgage upon this property some time after the mortgage was prepared for the purpose of sale and delivery, before she knew anything about it. I am not certain but I think I was in Los Angeles at the time of the alleged meeting [37] of the stockholders and directors of the Norma Mining Company at Mr. Lawry's office. I was there about that time and—I think I was there about the 15th, I am not sure. I was unable to find information at the hotel that would give me exact data, but about that time I was there. Have method of recalling the business that took me to Los Angeles very well.

(Testimony of R. T. Root.)

I got the money, with which I went from the Miller estate through Mr. Mackay. I refer to the money, a receipt for which has been introduced here, bearing date June 19th, 1913, for a thousand dollars. The business that took me to Los Angeles was to make a sale of a water power on which I expected a large amount of money, to Mr. Putnam. There was a good deal of correspondence with him on the subject. I got Mr. Mackay to go to Santa Fe, I believe, at that time, to file some paper there with reference to water rights. From there, he came to Los Angeles. He met me there. It is barely possible that he made a trip somewhere else first, but he came to Los Angeles right away. I couldn't say if he came on the same train, or had been on some trip, but within a very few days he was on his way there. The mortgage has been introduced, for \$16,000, was prepared and signed by me in Los Angeles on the 2d of August.

Recross-examination.

The witness then resuming, testified as follows: I went to Los Angeles. I am unable to recall the date exactly. I think I went about the 15th of the month, of July. I did not leave there the latter part of August, as I remember it. I could not swear that I was not in Denver on July 24th, but I am under the impression that I went before that time, nearer the 15th. [38] I am certain I was not at any meeting on the 19th or 22d. Yes, sir, I wrote that letter. My wife went with me. I think Mr. Mackay went as far as Lamy Junction. I think it was that time.

(Testimony of R. T. Root.)

He didn't go when I did. He came afterwards. We may have gone as far as Lamy but I do not think Mr. Mackay went further at that time. I do not recall that he went, I don't remember how that was. I know he was in Los Angeles right away after we were but not at the time. The hotel I stopped at in Los Angeles was the Alexandria Hotel. When I informed Mrs. Root of the execution of the mortgage, I don't remember. I do not recall the length of time, but it was some little time, as I remember. To the best of my recollection, it must have been at least, a number of months. She knew it was talked of before that time, but didn't know that it had gone into the condition of— She knew perhaps within a month or two. I didn't talk to her of having concluded any arrangements, as I understand, that I remember of, and I am satisfied she didn't know that papers had been made and executed for the purpose of delivery after the money was paid. I am sure she did not hear it talked about or knew anything about it before it was executed. Mrs. Root kept the shares of the Norma Mining Company, these 299,997 shares, with her private papers that she had, sometimes in one place and sometimes in another. She carried them with her, often-times, packed them about on her person. I have had them in my hands at different times, but she continued to have the possession of them. Not the slightest recollection of having them in my possession any time in July. Three hundred thousand shares have been issued. The remaining shares of that corpora-

(Testimony of R. T. Root.)

tion are unissued. Mrs. Root owned 299,997 issued shares. Mr. H. M. Root owned one of the shares. It was [39] issued to him after he paid the money, for the money he paid. I think he did pay a dollar. Mr. Walter W. Root owned the other share. He was a director. I owned the other share. I paid more than a dollar for that one share, to the Norma Mining Company, expenditures of the Norma Mining Company, in money. I believe there were no other shares issued—excuse me. There were none other shares issued, I believe, at the time these three that were paid money for, as I remember. When I first saw the resignation of Mr. Lowry as director and secretary of the Norma Mining Company, I don't remember, but it was a long time or some time before it was accepted. His resignation was accepted by the board—it was in 1911, in July. It isn't true that on the formation of the corporation that this resignation of Mr. Lowry, undated, with the resignations of the other directors, was all filed with the company as a matter of form. I admit that I got money from Mackay from his estate through him. It is true that I got money from Mr. Mackay belonging to the estate of George Miller, deceased and he had security for it. He had the mortgage as security. I have not paid the money recited in the mortgages. They are not sold yet. I have not paid anything on the notes. I have not paid anything on the mortgages for sale, the ones that were to be sold. I have not paid any of the notes that I gave to Mr. Mackay in Los Angeles that

(Testimony of R. T. Root.)

are in evidence. I have not paid either one of the notes that the mortgages were given to secure. I have not paid either one of the notes that I handed to Mr. Mackay when he got these mortgages, and mentioned as security in the mortgages. I gave a deed to the farm, you see, to Mr. Mackay about the 2d of [40] September, 1911, I believe. I gave two deeds. First, I gave a deed in 1910. I delivered this deed in 1910, the 31st day of March, 1910, and he advanced me some monies on it, which were all paid up, and then afterwards a year, the next year, the 2d of September, I believe it was, he returned this deed to me, which I have here, and I executed a new deed to that farm, and gave him a check for \$4,500 with the deed, which I also have here. Mr. Mackay had some other monies of an estate that were not in his control at the time and wanted to use them as security. There was nothing that I had owed to him—I was not owing the estate anything excepting a loan which was secured, and approved by the Court, on real estate. Now, then, I did not owe the estate anything at all, and I gave him another deed to this farm, gave him another check and wrote a letter, such as he wanted, copy of which I have here, and afterwards he returned that check to me but did not return the deed. In the meantime, I got some more checks from him which was merged in one, into this \$9,000, and it then became \$10,000, and in this receipt— The conveyance of that farm had to do with this particular loan of about \$10,000. He was holding the farm then,

(Testimony of R. T. Root.)

afterwards as security for that. Under the arrangement that he would give me reasonable time before he would call for the money. I had it in writing here and I do not know its real value. It is comparatively small, what I paid—I paid \$27,000 for it in money but its value afterwards was not that. I took part of it at first, and part a second time, aggregating \$37,000. Yes, he took that property for the security. I will show you this paper, and it will give you exactly what that arrangement was. I believe I have [41] it here. Here is the check that I gave to him at that time. He said that he had loaned—that is the receipt that he gave me for the \$4,500 undated check. He held the farm as security. There was no writing about its being security. I gave him checks afterwards, soon after September, at various times, aggregating the amount named, and he continued to hold the farm as—against the checks, or continued holding it until the checks were paid, and still holds it. I refer to September, 1911—September 2d, I believe, 1911. Mr. Mackay has that deed—executed the deed—he recorded the deed. He was not to record it, but he had—he said he was afraid to hold it in that way—unless there would be complaints about it, and knew that farm was the security for the money that he wanted to have paid off. I mean the \$10,000. That was why I gave that contract with him which I expected if he could make a loan would carry through. After that had all been cleared up, he did not tender or deliver to me a deed reconveying the title to that

(Testimony of R. T. Root.)

farm to me. He never offered to do so. These shares of stock were issued to my wife at the time they were executed by Mr. MacDermott. They were first issued to him and then assigned to her. I believe they were not issued right at the time of the organization. After they were issued to Mr. McDermott, they were transferred by him to ~~Mr.~~ Mrs. Root immediately. The certificates were made to his order and then assigned by him to Mrs. Root. The object of issuing them in his name was a sort of formal organization or way with a trustee to transfer. A lawyer advised that it was better to put the corporation through a second party, and we had that advice from some of the best lawyers there, not in this matter but in other [42] corporations. These were written, dated July 1st, 1905. I think it was two or three years after the organization of the corporation. Before that time, title and transfers were in such shape it was considered not to issue them. I don't think they remained in the book, executed, for a year or two. The consideration of the assignments of these shares of stock was the property, these White Hills, the Norma Mining Company properties, 46 patented mining claims. She had the title to them. It was arranged that she was to have the property with money she had paid. It was an arrangement that was through Mr. Moffet, with whom I had a great deal of business, and he made the deed accordingly, made and executed and delivered the deed. He executed the deed and Mrs. Moffett was away and there was some delay about

(Testimony of R. T. Root.)

her executing it. We wanted it acknowledged and signed by her. And then the deed was held for a long time unrecorded. The deed was delivered to her on its execution by Mr. Moffet. The 3d of July, 1905. It was delivered at that—the 3d, not just that date but right around that time. Mrs. Moffett had not acknowledged it and it was taken back to Mr. Moffet and drew up her acknowledgment and that was, now let me see, in 1907. That would be my memory about the matter, two or three years, you see. I never owned these shares of stock, or any interest in them. I do not recall having had a proxy from her. I may have, but, to the best of my memory, I had not. I never voted them as my wife's proxy at any time when the corporation had under consideration the execution of these notes and mortgages. Certainly not. I have not the slightest memory of ever having had such a thing. To the best of my knowledge and believe, I have not. This company had no stock ledger-book. This is the only stock book it has. [43]

**Testimony of Hugh Mackay, for Plaintiff
(Rebuttal).**

HUGH MACKAY, recalled, testified as follows:
REBUTTAL.

In July, 1913, had a conversation with Mr. Root in reference to the payment of the monies which I had advanced to him. We talked about it at different times. July 19th, we talked then. Had conversation before I met with Mr. Root in reference to the

(Testimony of Hugh Mackay.)

payment of these monies advanced to him, at different times whenever he came to Denver. I did. Yes, in July. I think the morning of the 19th was the time I talked when I come to talk with him. We talked about it and Mr. Root told me, "Mr. Mackay," he says, "if you are afraid—he was rustling for money then, you know—" "if you are afraid, you know the White Hills in Arizona." I said, "Yes, I have been there." "Well," he says, "I will give you security on that." "Well," I said, "I don't know whether I could handle it that way," on account of it being trust funds, of course. And he talked and said he would like to get some money himself, and finally I said if mortgage was given on it and sold might be able to cash it, or something like that. Well, we talked that over and concluded that I would try to sell a mortgage and pay off this estate debt, and Mr. Root wanted some money. The property referred to was that same property, the Norma Mining Company. Well, we talked the matter over until finally he told me, "You know Mr. Lowry?" I said, "Yes." "Well," he says, "he knows all about it"; and we went over to see Mr. Lowry. He said Mr. Lowry was one of the directors of the company that owned the property, the Norma Mining Company. I didn't know the name of it then. Well, he said, "We will go over there"; and we went over to see Mr. Lowry in the Colorado Building. We went to his office, Mr. Lowry's office. We had a talk [44] *a talk* about this matter. The talk was about money, and if it could be raised and finally it was concluded

(Testimony of Hugh Mackay.)

that Mr. Lowry should get ready resolutions, etc., for a meeting to authorize the execution of the mortgage or mortgages up to \$25,000 on that same mining property down in Arizona, the Norma Mining Company property, and Mr. Lowry said he would attend to it. In the afternoon, Mr. Root appeared, and Walter, Mr. Root's son, and one of the directors, as I understood, and a resolution was voted upon, authorizing the execution of the mortgage or mortgages to the amount of \$25,000, and they held a director's meeting right away. They fixed it up, just what was necessary. I talked to Mr. Root and told him, "You want to have this thing right," I said, "*if going* to do anything with it." He said, "Mackay, I own every share of stock," and he exhibited the shares right there. They were issued in the name of McDermott and assigned in blank, excepting a couple of shares. He said there was one in the name of Mr. Lowry, and Walter Root. Well, I told him I supposed that was all right. He said, "In addition to that," he says, "the company owes me approximately \$30,000 now." He says, "I don't know the exact figures, but Mr. Lowry there knows." And he says, "Any mortgage that is issued," he said, "for money for me or for my use to the extent of that amount," he says, "there is no one on earth that can find fault with it." Those are the words he said. I said, "I believe that." Mr. Walter Root was there. Mr. Lowry was there and Mr. R. T. Root. Lowry did the writing up of the thing, of the minutes—resolution. He is the man that attended to

(Testimony of Hugh Mackay.)

the business, and he acted with them. That was the 19th of July, 1913. Mr. Root said that he expected [45] to be able to get some money in California, but he wasn't sure, and he said he would like if this mortgage could be handled, and if it should be, it could be made, he was empowered now to make it any size within the limit that would satisfy them if we could get a party, and he said, "I want you to go to California with me and we will fix it up some way," he says. So we left on the 24th and we got to Los Angeles perhaps around about the 27th and I was not able to do anything with it. I stopped at the Hollenbeck. Mr. Root was at the Alexandria Hotel. I visited them at the Alexandria Hotel very often. The only reference was about the amount of the proposed mortgage. Mrs. Root had something to say about it. She thought it should be made \$25,000, and Mr. Root told her it was hard to sell any large amount of mining property just now. So did I. She wanted Mr. Root to have what money he needed in his business, also. He was needing money at the time badly. The purpose of Mr. Root, as announced by himself, in going to California, was to try and raise money for different things. He expected to get money from some other source, unless he could get it on the mortgage. It had reference to the payment of my claims. He obtained the money over there, I think, after I left but not before I left. I couldn't arrange for some one to buy the mortgage or purchase it, and we concluded that he would make one to me and I would go alone on back

(Testimony of Hugh Mackay.)

east, back to Denver, and I would try to raise money there on the mortgage sale. It was executed right at that time. The mortgage that was executed has been introduced in evidence. The receipt introduced in evidence, I signed it. It is his writing so far as I know. There are some interlineations in there but I know [46] I signed it. I am sure that I signed it, and that Mr. Root wrote it. I returned to Denver with this deed from Los Angeles, with the mortgage. I tried to sell it. I endeavored to sell it and out of the net proceeds it was understood between him and me, that is, personally, that even if it took a thousand dollars discount or more, to get the money, and then he needed some money himself. This mortgage is for \$16,000. At that time the mortgage was given me at this time to sell, and we hadn't come to that yet at this time. I came back to Denver, as I say, and I hadn't yet been able to sell it, and if I could have been able to sell it, I was authorized to do so and so, you see. So that indebtedness was not fixed in there at that time. I went back to Los Angeles from Denver. I left on August 2d, and on the, about the 22d or 23d, I went back again. I didn't succeed in selling. And we had some correspondence in the way of telegrams to his son, in cipher. All I could tell is what he told me and Walter. He told me what his father wanted to do and for me to go back, and I went, and when I got back there I arranged with Mr. Root—I had the checks yet that were offered here. I had all those checks in my possession. I refer to those

(Testimony of Hugh Mackay.)

checks introduced in evidence here. They were due and overdue and I was afraid, of course—considered as cash in my possession—and if they were not paid I did not know just how it would be. So I told Mr. Root that the best way to fix this thing was to make notes for the original amounts that were due from the debts of the original loans received, and we computed the interest, etc., and give me the mortgage to secure the amounts represented by these notes, and if sold I would fix the thing up and give him his checks. That was [47] the way it was done. Now, I told him—he thought he could get the money within, maybe, a month. Now, I said, “I will hold them for you just as long as I can, and you just hurry as much as you can.” From time to time I did that. Now, if you want to know the arrangement that was made, I will tell it. I took this \$16,000 mortgage as my own as credit. I delivered to Mr. Root the checks in question, yes, sir, and took from him the notes that have been introduced in evidence. He got the money for all of them excepting one item amounting to \$3,000. He didn’t cover the whole of the mortgage, so I made an arrangement with Mr. Root that I would take it all and I would give him a due-bill for that, and I had other notes on another matter between him and me, and since then I have fixed it all up. The indebtedness that I had in claims against Mr. Root at the time I took this mortgage as security would be about \$13,000. Root advanced \$3,000 but I did something else. Yes, I had some notes and bonds. They didn’t belong to

(Testimony of Hugh Mackay.)

this same loan. They were personal matters between him and me. They were five hundred and some interest, and then I told him I would pay the balance, whatever it was. That was not embraced in this transaction. At the time I was in Los Angeles, it hadn't amounted to that much then. So as to make the \$16,000, the amount that I had with me there against him to fix up, was \$3,000 there. I said, "I will fix this thing with you this way. You can put it all in for the estate, and that leaves," so much. "Now," I said, I told him if he wanted me to take in any of that note, these notes and bonds I am speaking of, for \$2,500 and some interest, which he faithfully agreed to attend to. He said to me, "Mackay, you give me a [48] receipt for it and when I get to Denver I will have some money and I will pay you in currency, and you can hand it back to me"; and in the meantime he made a receipt on the other and made a note, and we fixed this \$16,000 in that manner. Mr. Root made a personal note. You know, the amounts of these mortgage securities were represented by demand notes. He so understood, I guess. There was, first of all there was items of \$9,036.18, then there was another check of 750—that was a personal check to me that he gave me on the Colorado National Bank, then there was a check of \$1,000—see? I had these checks. I am stating what I gave, made the amount of the checks. That is what you wanted to know, what I surrendered in cash for the notes and the mortgage. First of all there was several checks that aggregated

(Testimony of Hugh Mackay.)

\$10,036.18, then there was one check of 750. There was another check of \$1,000, then I gave Mr. Root—on the Colorado National Bank in payment of amounts of money he got before that. That belonged to the estate, excepting this 750, but I put that in, also. Then, I gave him a check for \$100 on (indistinct) and that made \$10,886.18, in addition to that. There was an item of \$250 that was between us that was charged in there in cash. That was all in. Then we figured interest from the date of the checks to August 2d, that is the date of the mortgage, and I think that interest there amounted to \$120.63, outside of this \$3,000 spoke of. Then he had a loan of \$14,000 that he received, and the interest was back a year and a half, at 6%, and I told him we would have to do something with that, and that was included in there. There was interest on it for a year and a half, \$1,680, I think was the amount. Now, figure out how much that is, and [49] then there was \$2,000 I speak of, and the interest on that. That was the 3,000 that we lacked, but I had exchanged that with Mr. Root for something else. That something else was—it was a charge against him. I had \$2,500 in notes and some bonds, secured that from Mr. Root in another matter altogether, and there was \$2,500, and I said, You do so and so with me, and I said, “We will apply that on it,” and I said, “I will give you the rest in cash pretty soon.” He said, “All right, we will fix it that way,” excepting that he said to me, “Well, just give me a little memorandum, anyway you want to, and when I get back

(Testimony of Hugh Mackay.)

to Denver I will hand you the currency. I said, "All right." So that is the way we did it. When I got back gave credit for it and I applied that other note against it, and since then I got my money at different times until there is—everything is square now, a long time ago. The 3,000 for which I gave him a due-bill is included. I exchanged with him. I charged that up to him against it, and paid the rest in cash. I credited Mr. Root with the \$2,500 and gave him some cash money. Yes, sir; when he came back—he started East and when he came back again in two months, I gave him more than that, and there might be other things between us personally, but not a great deal, but there is several amounts I helped him get and I had some of them to pay since that happened, before went to New York. There was an understanding that this mortgage should not be recorded unless sold. He said, "I don't want you to record it. I am going to get the money"; and he had some big deals on, and I thoroughly believed he would get it, and I wanted to help him all that I could to get it, but he didn't get it, and, I didn't know [50] —I told him I won't record it just as long as I could hold it off. Well, it would interfere with him more or less, he thought, and then he might get a larger amount himself. In fact, he tried to, but people didn't seem to want to loan him, and he didn't get it. If he would get a larger sum he would pay this off. I withheld the mortgage at Mr. Root's request, of course. Well, he simply told me not to put it on, because he was trying to arrange a sale

(Testimony of Hugh Mackay.)

or loan or something, and if it went on record it would hamper him doing so, and I believed that it would and withheld it, and he gave me his word and honor that he would not allow any other encumbrance to go against it as long as he could possibly hold it, and he told him that condition when he gave that first mortgage and I found it to be so. [51]

HUGH MACKAY, in rebuttal on direct examination, testified as follows:

About the 2d of March in New York, Herbert Root came to me and said he had a telegram from his father. He wanted me to go through to New York at his expense. I told him to send the money. Well, he said, he couldn't, he didn't have it, but he would pay there, and I went; and Mr. Root and Walter Root were at the hotel where I stopped, the McWelton Hotel. He was in bad shape for money, with hotel bills and different things, and he had a deal on where he was going to get a large sum of money, and I should help trying to raise money. The plan was first, he would make a new mortgage, if he could arrange with some one, make a new mortgage on this Arizona property, this Norma Mining Company property, provided we could arrange it with some one, and then he would pay up this \$16,000 mortgage and have some money himself; and there was another man and myself there and we couldn't do anything, so finally we tried on a second mortgage, but no, nothing could be done. Then, after nearly a month waiting and nothing doing, I got ready to come back to Denver. I told him, now, Mr. Root, I said that I

(Testimony of Hugh Mackay.)

might try to sell a second mortgage in Denver or to raise money some way for you, if I can. He claimed that if he got \$4,000 it would put him on top, etc. Well, the mortgage was prepared—this \$5,000 mortgage, this second mortgage that I got now was issued, and I was to come on to Denver to try and sell it or buy it. I was [52] authorized to sell it for \$4,000, or take it for \$4,000 either thing. I came to Denver and couldn't get any—and a couple of days after I reached Denver, his son followed me, and he said he was in terrible shape. They had made checks for \$1,800 on the German-American Trust Company, and they had no money there, and it was nearly four o'clock, or half-past three. And he told me, "If those checks are not paid, we will be ruined, because it *will this* deal," etc. Well, I went and gave him a check for \$1,810. Plaintiff's Exhibit "H" for identification is the check I gave Mr. Walter Root. I gave him a check for \$1,810 and I decided first—Well, I would raise the rest of it in some manner or another, and it took me some little time, but I paid first a thousand and then fifteen hundred. I was all through. I made another payment. I have a statement where they figured it out. I must look at it. \$1,810 then there was a check for something else—80—1810—80 dollars. Plaintiff's Exhibit "I" for identification is the check that I gave to Mr. Walter Root. That is in this statement here. The next payment may have been two checks; 255, I think it was in two checks. These two checks make up the total of two fifty-five dollars. The next payment in

(Testimony of Hugh Mackay.)

a check was \$1,000; the next payment, five hundred; the next payment, one hundred and twenty-five dollars. The next payment balances the account, and if I am allowed to explain it, I will. There are several items here that I did not mention. How is it, can I explain this. Well, the reason of this money. I was given to understand and pressed by Mr. Root and his son to get it under all circumstances, at any expense, they would have to have the money, and this account was in my expenses when I [53] was in New York, and he paid back certain amounts that is included in that, too, but in this matter I had to pay on one loan of two thousand, forty dollars commission. That was agreed upon; and there was on another a discount of about a hundred dollars, but this is—it is the whole transaction, when I left New York until we finished, and the last I got in the account was a balance of \$183.58. This statement was made right there at the time and every item put on and every transaction. It is the original, and figured up by both of us. It has been attached to it ever since. Plaintiff's Exhibit "P" for identification is a check that I gave the hotel at Cheyenne for expenses and in this check that I gave Walter Root—that was between five hundred and a hundred and twenty-five—they wanted that—that is included in here. Plaintiff's Exhibit "P" for identification, I gave to Walter W. Root on account of that mortgage. The amount of that is seven dollars. When I got the amounts there at Cheyenne, he told me to pay this, as he needed it—he got so much—and he said,

(Testimony of Hugh Mackay.)

“Let me have a check for \$7.” I said, “All right”; so it was included in there. In addition to the amount, as represented by these diverse checks introduced in evidence, charged up against the second mortgage is \$4,370, and in that, the expense to New York and back and the expense of commissions getting this money is charged, and Mr. Root has paid certain amounts that are there, so the whole thing balances \$4,370. That is the whole transaction. The amount of the checks introduced in evidence and the expenses about the second mortgage, obtaining the money, commissions, travelling expenses to New York and back, make up \$4,370. I spoke of his having paid some amounts on that \$4,370. They were credited. [54] The amount of the mortgages that were to be paid was \$4,000, the other was expense. The expense was paid by Mr. Root. I said the \$4,370 was the total of the cost of the transaction, with expenses, etc., but Mr. Root paid all excepting these checks. He was getting \$4,000, and there was expenses to New York, etc., in obtaining the money, that he had paid. He was to pay my expenses back to New York, etc., that was the absolute understanding, and the whole transaction is right here. I paid Mr. Root on account of this second mortgage \$4,000 less the small commission there. Well, the absolute understanding was on that mortgage that if I should get \$4,000, would get \$1,000. That was I and Mr. Root’s strict understanding with me and furthermore—I was to get the additional \$1,000. Before I got away from the hotel, he had receipt made for this

(Testimony of Hugh Mackay.)

mortgage. The receipt is in evidence here. "Well, you better sign this," he said; and I looked at it and I said, "This is five thousand." He said, "Well, take it, never mind, it will be all right, all right between us, just go ahead." "All right," I said, "I will take your word for it, take your word for it"; and he come with me to the depot and he told me, "Mack, if you can, get this money, because," he says, "I have everything along ready to get on top, big deal on." I have paid several amounts that I had to guarantee for Mr. Root and I had to pay them, and he did not get his deal through, and I just gave him credit for it. Plaintiff's Exhibit "Q" for identification was for money for Mr. Root, and I had to endorse it and secure it and I had to take it up. I put that in. Mr. Root never paid that back. I gave him credit for it on this thing; gave him credit on the second mortgage for that amount. Plaintiff's Exhibit "R" [55] for identification is the other one. I gave him credit for it. I endorsed the note and had to give security for it. I paid the note. Mr. Root never paid me back. I gave him credit for the amount of this note on the second mortgage.

Introduced and read in evidence.

Witness then resumed, testified as follows: He wrote the receipt. He signed it himself. Mr. R. T. Root. In reference to the farm at Boulder, Colorado, there were two transactions. In 1910, March, Mr. Root took me up to Boulder to show me this piece of land. He wanted to borrow some money on it, and it is a piece of dry land, so I went up with

(Testimony of Hugh Mackay.)

him and looked at it and tried to find out the value, and finally I concluded that I would let him have a thousand dollars on it, which I agreed to do and did so and he gave me a deed to it along with a note or checks to hold, and I held it until about—on the 31st, I think, of August, 1911, got some money and we squared things up, and he paid it back, he paid this and some other checks he got, and “now,” I said, “here is your deed,” so I gave it back to him. Then I got another deed on the 2d of September, 1911, and a check for \$4,500. I said I received a warranty deed to that piece of land and a check for \$4,500 or Mr. Root’s and against that I let him have some money on his checks, just temporarily. He agreed that he would pay the checks any time it would be necessary, cash the checks, and that thing ran along. I was away some time out of Denver, and it ran along for some time and it was increased, and finally the matter became—or it came to the point where wanted to fix it up. He carries it up to the first mortgage, and, probably before the first time I had it [56] recorded, I think probably I did, and I had thought the land was not valuable but, at the same time I did not want somebody else to interfere, because there was suits and I was afraid of judgments coming against it and things of that kind, so I just put it on record. I told him about it. So it remained in my possession. This \$16,000 transaction was before the Los Angeles transaction. I had the deed all the time. About this Boulder farm or that deed in the transaction at Los Angeles,

(Testimony of Hugh Mackay.)

about the \$16,000 mortgage, we talked about it. I told him I would do whatever he wanted about it. I told him I would deed it to himself or anyone he said. He told me just to leave it stand as it was, with the expectation that we would get the money pretty soon from other sources and he would pay everything up. Well, according to my accounts, it will take about \$4,000 to square up over and above the two mortgages. The value of the piece of land in July, 1913 did not exceed \$1,200. It is worth about the same now. It is just a dry piece of land near Boulder, and kind of rocky. You can't get water on it, so it has practically no value unless something should turn up. He was figuring on oil, sometime. In the meeting testified about at Mr. Lowry's office, in July, 1913, in Denver, I saw stock of the Norma Mining Company there. R. T. Root had it. I think there was there, I understand, 300,000 shares. He showed me the certificates. They were signed by the company, and they were assigned by Mr. McDermott. They were issued to Mr. McDermott and assigned in blank by him. Mr. Root had them right there. He said he owned them all, with the exception of two shares, and they were in the names of two directors, to qualify for directors, Mr. Lowry and W. W. Root. I [57] didn't pay much attention to it, but I think he did show me them and said, "Here they are," These monies involved in these suits were monies—the whole transaction took place and the mortgage was executed and the money loaned after the death intestate of Mr. Miller.

(Testimony of Hugh Mackay.)

After the execution of this mortgage in Los Angeles, this first mortgage, I saw Mr. Walter W. Root in Denver, Colorado. That was after I came back. When I saw Mr. Walter Root, he put the seal on first mortgage. That was in—July, August, September—about September 1st; might have got back during August. When he put the seal on, Mr. Lowry was present. I know Mr. Herbert M. Root, Mr. Root's other son, very well. I had conversations with him about these mortgages. We talked them over numerous times. Said they would be paid and that Mr. Root would make a turn and get money, all the time. They were anxious. This \$4,500 note—check—I just put it in the vault and left it there until I gave it back to Mr. Root. I never used it in any shape or form. Plaintiff's Exhibit "F" for identification is the same property as described in these mortgages. They belonged to Mr. Root. They were in the name of the Norma Mining Company. They are the same property as involved in this suit or described in these mortgages.

Offered and read in evidence.

Cross-examination.

Witness then resuming testified as follows: The check dated September 2d, 1911, for \$4,500, signed R. T. Root, and payable to me as executor, is the check that I have just referred to in my evidence. I expect it is. I have no reason to think it is not. I just handed it back. I did not advance money at the time [58] that Mr. Root gave this check. I think I did at that time, September 2d. I advanced

(Testimony of Hugh Mackay.)

the sum of two hundred and something, on the 5th. That is my recollection. Mr. Root was not indebted to me in any sum whatever at that date. No, I think we were square on that date, even, I mean. It is not a fact that Mr. Root had cashed some checks which I did not want to cash, for my own benefit, on the executor's funds, and that there were some amounts of that kind that had not been settled that I had not paid Mr. Root. Not on the 2d. Well, I couldn't answer that question if Mr. Root cashed checks amounting to \$1,060 for me, where I would sign the check to his order and he gave me the cash for them unless I see something to remember about it. If I did, I accounted for it, that is one thing certain. Now, tell me the time it was and I can tell you. If he did cash checks for me in the manner described, prior to that time, I don't remember now, can't tell right now unless you call my attention to the time. There may have been once or twice where he loaned me small sums and may have done it that way. Now, if I would know the date I will tell you anything of that kind that happened, but anything that did happen we kept track of it. The statement of account dated July 15th, 1909, I suppose I must have seen it. Those checks, \$1,060.25, I borrowed of Mr. Root. That was the way that was at that time. That first transaction about that ranch in Colorado, that was in 1910, February or March. Well, I will say this myself, that I have an account of these items myself. What I mean is, the dealings we had at that time, you see, because I had, during that time, bor-

(Testimony of Hugh Mackay.)

rowed from Mr. Root a certain amount two or three different times. [59] No, I wouldn't say that I borrowed it in the manner described. Well, I couldn't say that I sent checks, signed by me as executor, to Mr. Root's office. I will say this much, that if that happened, of course it was a matter between him and I and nothing else. No, sir, I didn't say that when I made that statement, which was marked for identification, that the amounts which Mr. Root had thus advanced were included. No, sir, I didn't say that. When the account was purported to be balanced as of August 31st, 1910, it did not include such amounts as Mr. Root had made me personally. There was a small balance, old balance, before that, during the term of that matter. I did not say that I went to Mr. Root and said to him that I desired, because of the demands of some of the heirs, that he give me a check for \$4,500 and make this conveyance of this farm and sign a statement that he needed the money himself, and which I would hold and ultimately return to him the check. It was his own proposition but never used, see. It was for himself. Why, I did have the letter which he signed at that time. Why, yes, that is a copy of it. Yes, you see, with this check; yes, sir, but I never used it for anyone else or myself. I told him that I had or was going to make a statement. Yes, and I told him I had everything except I had a check of Ross'. Now, I said, I didn't know whether he would be ready to pay it or not, in case it was required, you see, and Mr. Root says, "Well," he says, "I will

(Testimony of Hugh Mackay.)

make a deed to this land in Boulder"; and he says he will make a check, "and if you need it you can use it"; and he says like that, and he did. I didn't need it. I says, "Mr. Root, I don't need it." "Well, all right, keep it, I will use some of it. [60] myself." That is all there was about it. This check for \$4,500 never was used. It was handed to me, but that same forenoon I handed it back. "Just keep it," he said, "because," he says, "I may use it myself." I did hand it back that day, right that day. I kept it. I am holding just now (letter admitted, marked —) I said I gave Mr. Root some money on September 2, 1911. The date of the check. If I took Mr. Root's check for it, I didn't keep it. I don't think I took his check as executor for the amount. It went against this particular check, everything, but it was kept track of up until it reached certain amount, and I held that check right along, that is my recollection of it. Whatever check I got, I gave it back. The other was the amount of the one that was before. The farm was held as security, that check and the farm. I did receive some checks signed by R. T. Root, which I held for the several amounts named. I don't know, but he gave checks for some, I know. I think not for all of them. I did not get checks for the whole loan. I can't tell from this which ones. I did for some of them. It is a fact that on June 9, 1913, those checks which I held for these loans were taken up and a new check given for their aggregate sum, with the interest on the several loans from the dates they had been made.

(Testimony of Hugh Mackay.)

The endorsement on the back of this paper is my signature. (Defendant's Exhibit No. 32 introduced in evidence.) This check of \$4,986.42, was one of the items that went into the Los Angeles transaction. One of the notes, given on August 25, was for \$3,250. While it was given on that date, it was dated back to April 22d, 1913. I did not give Mr. Root any money on that date. He gave me credit for \$250 that he had received, that is, one [61] hundred and fifty and one hundred, that left \$3,000. That is the way we fixed it. That note was payable to me as executor. It is not a fact that I explained on that date that I had used funds of the Miller estate of that amount and desired a note and receipt acknowledging the receipt of the money, in order that I could show to the heirs of the Miller estate. I told him that if he would arrange it that way that I would fix it with him on a certain note, bonds, that we had between us, and pay him the balance in cash. I told him I was needing money, and if he would arrange it that way, I would take the whole mortgage, and he said it would be all right that way. Well, I gave him on that same day my obligation for \$3,000. I made him due-bill and I returned to Denver. We was going to fix the matter up, that was our understanding absolutely. I did not pay him any money that date. At a later date, yes, sir. I gave him my obligation for \$3,000 and he gave me an obligation for \$3,250. That, he did not receive any money on. He received \$250 prior to that time, the balance he did not receive. It is not a fact that that \$250 was

(Testimony of Hugh Mackay.)

a part of a check for \$750 that he had given me, I only advancing \$500 and charging him an extra \$250. I don't know there was such a transaction. Whatever transaction there was, there was some proposition of his. He gave me check. There is one of those checks he gave me for \$750. He wanted to go to Kansas City and I gave him five hundred myself. I gave him seven fifty. He had given \$1,000 to me on June 19th, as the record already shows. The difference between the \$9,036.18 plus the \$1,000 he gave me on June 19, 1913, or a total of \$10,036.18. That seven fifty check of his was one. He got that check for [62] seven hundred and fifty and he got one hundred dollars in cash. He got one hundred dollars on July 24. Yes, I think that is the last one he got. There was a note also executed under that date, for \$1,550, but given a date of May 25, 1913. That note made up of the personal check of May 29th, 1913, for \$750. Only one check for 750. Root came to me—that was a personal proposition. Root came to me—he was going to Kansas City on some scheme or another and he wanted money, and he told me he would give so and so. He wanted to meet me first himself, and he gave me this check. This 750 check. That is the only thing. And then to make the rest of the \$1,550 of this note, I held his check payable to me as executor, dated May 23d, 1915, for \$500, and another check dated June 11th, 1913, for \$300. Then, the 750, 500 and 300, constituted that note for \$1,550. Then there was a note also for \$4,455 to which I gave a date of September 16th,

(Testimony of Hugh Mackay.)

1911. And then there was a note for \$1400 to which I gave a date of December 13th, 1911. There was a note for \$1,655 to which I gave a date of December 19th, 1912. And there was a note of June 19th, 1912, for \$1100. And then there was a note dated August 25th, 1913, for \$3,590. This note purported to be made up by interest which I computed on the Lowry loan for \$1,680. He gave me a receipt for it—Mr. Root. What constituted the balance of \$910 is the interest. We went back to the original amounts instead of the checks. We went back to the original amounts instead of the checks. You understand. See. \$4,455 from its original date and counted the interest straight through on each sum, and then that would make the \$910. Just made a note for interest from August 2d. That is [63] the way we did. It was paid to August 2d. Mr. Root was to pay some money when he got back to Denver on a deal we had. There was notes and bonds—\$2,500 transaction—went back to Kansas City some time, some years before. I refer to two notes of \$2,500 each. Of the Treasury Mining Company, for which you hold bonds as collateral. And \$2,500 was all the money I advanced. It is not advanced. I will explain that. Mr. Root was owing money. [64]

In 1912, in December, or November, rather, Mr. Root came to me and told me that he had a deal back East, and if he had \$2,500 that he would surely get it through where he would get a hundred thousand dollars worth of bonds as well. Well, I said, "I

(Testimony of Hugh Mackay.)

have not got the money," and I said, "Get it yourself." Well, he kept coming to me and trying to get me to help him. That was the way he put it. I said, "I can't risk it, Mr. Root." You see? Well, he kept on and on. "Now," he says, "I will tell you," he says, "I will have you put up \$2,500," he says, "and I will get this deal through and I will pay you when I get back in ten days, \$5,000." That is the deal. Well, I told him I was afraid, and I didn't get the money, and he kept running after me until I set out trying to get it; and after I gave him the money, he hands me The Norma Mining Company note, not the Treasury Mining Company note, hands me their note, and five bonds that he was to pay if he got the deal through; and I took the chance, and these notes were not worth a cent. I knew they were not, but if he got his deal through they might be worth something; and I went and borrowed the money and give it to him, first gave him \$1,200 and then \$1,300. All I advanced was \$2,500. There was \$2,500 paid on the note, but there was \$5,000 due. I asserted the right to hold the notes for the extra \$2,500 commission. It was in 1912. Well, there was \$2,500 paid on these notes in January, 1913. I understand that Root referred to that transaction when he said he would go back to Denver and pay some money. Root wanted me to do this for him, so he said, no, he said, he couldn't get anybody else to do it, and if he didn't get it through, he would be ruined. He said if he got this money—he owed \$250,000 and [65] he had these notes with the

(Testimony of Hugh Mackay.)

Moffet estate and he could pay it off for \$48,000 if he got this money. Well, I said I would do it and take a chance if he didn't get it through. I took the chance. That I went there to Mr. Root, after he had paid the \$2,500, and asked him to let the Treasury Mining and Reduction Company pay the full \$5,000, although they had only had \$2,500 on account of it, and agreed that if he would make that bargain that I would give him \$700 bonus is an absolute falsehood,—absolute. Never heard of such a thing in my life. I paid him \$2,500. I was to get 5,000 if the deal went through. He gave me that note for \$5,000 and bonds to secure it. It did go through. And he came back and he got the money. He paid 2,500, and he said, "Now, Mack, will you wait a little for the balance"; and I said, "I suppose I will have to"; and I never heard another word about that until we were down at Los Angeles, and I told Mr. Root, "I would like you to do this thing," and he says, "All right." Exchange this for another note. In about a month afterwards, or maybe less, I have the dates of it, he told me to wait a little. Mr. Root came to me one day and he says, "Say, Mack," he says, "I have now the money arranged for all those bonds"; and he says, "let me have—and I will go and collect the money in Kansas City, and I will come back within ten days and I will give you the cash"; and I said, "All right"; and he made out a receipt to take the bonds, to return the bonds or pay the money within ten days. He got those bonds and sold them. He got the money and he didn't pay. And that is

(Testimony of Hugh Mackay.)

the way that he wanted to get this thing fixed. I wanted that amount included in the mortgage that was executed in Los Angeles. He made note for it and I gave him a due-bill [66] for the amount and charged up this note against it. He told me, "Whenever I get back to Denver I will have some money and I will give you the cash," and then I was to pay the balance. That was the strict understanding. He took the bonds away from me. It was his own proposition all through on that 5,000 business. That \$2,500 is embraced in one of the mortgages. That is what I was getting in the account. I gave him a due-bill for so much, and credited him with paying this \$2,500 note, when he got back from Los Angeles. I arrived at the amount of the first mortgage in this way. The first mortgage was the amount of money that was loaned to him exactly plus interest and plus interest on the Lowry loan made for him of 14,000. That would leave a balance of \$3,000. You see? And we had in that \$3,000, and he made a note for it, too, and I gave him a due-bill for the amount that he had not received of it, and we was going to arrange it in this manner when he got back, but he didn't stop when he got back. The \$2,500 is in the first mortgage, in the amount of \$16,000. These endorsements of interest on the back of the notes that have been offered in evidence were made on that date, that they were executed. I refer to Exhibits 9 to 16, inclusive,—on August 25th or 26th. I mean by saying September 19th the average date—well, for different items that were embraced in these

(Testimony of Hugh Mackay.)

notes. I want the Court to understand that this \$16,000 mortgage I took as collateral to the notes received on the 25th, as security. Mr. Root and myself were present when that agreement was made. The conversation was in the hotel, on the 25th or 26th of August, in Los Angeles. There was a \$3,250 note, and also my obligation for \$3,000 to Mr. Root. There was—the only amount was \$3,000. The obligation I gave him. There was 3,000 of the amount unadjusted when I [67] left Los Angeles for which I charged up 2,500 and interest on these notes and bonds I spoke of and then I since gave him the difference in cash. The difference in other checks, outside of that. I will produce them. I have those checks here. I did not in a report of the affairs of the Miller estate show a credit of \$4,500 under date of September 2d, 1911. Never exhibited that to anyone, excepting Root, nor used it in any manner, shape or form. The \$3,250 not yet taken credit with the Miller estate for that. It is a matter between him and me so far, nothing filed. There was no other contract with reference to that money. Mr. Root knew that I credited or charged the amounts which I had paid subsequent to the \$1,810 to the Norma Mining Company second mortgage. I advised him as soon as I came in here from the—I had the mortgage there, and when we finished up the transaction. That is all the advice I gave him, except that I was trying getting the money on it. I have the memorandum from which I testified this morning. I advised Mr. Root that I had credited myself on the sec-

(Testimony of Hugh Mackay.)

ond mortgage for these sums, subsequent to the \$1,810. I had finished my transaction, paid what I was going to pay. I advised him a dozen times. I have seen him over and over, and told him so. That money, aside from the \$1,810, was not covered by any other contract. No contract whatever; no, sir. The only thing that was understood, I couldn't get it without selling or paying up certain things, had an option to raise it, and I wrote and told him unless he agreed to make good any loss I would have, provided he didn't pay within the time specified, he would have to stand the loss in addition. That is the letter I wrote him—unless he would agree that he would pay the loss that I would have. I went and borrowed the money to [68] pay the balance on this mortgage. Now, if he didn't pay back in time he would lose it, and he lost it. That is exactly what I mean. (Letter put in evidence, marked #33.) Mr. Root accepted that proposition. I would not have gone further unless he had. When the meeting on July 19th, 1913, was held, it was understood that I would undertake to sell the mortgage. This is the same mortgage that was finally delivered on August 2d. It didn't say \$16,000. The authority was for certain sum to be executed or issued in amounts or on such terms as Mr. Root should decide. The amount, etc., was left for Mr. Root and myself to determine. I didn't know whether anything could be done with it yet at that time. There was no trouble at the time. I just wanted to try and get the money in some way. I thought I had got it

(Testimony of Hugh Mackay.)

arranged when that resolution was passed. On that event, we might get it arranged. That was a step towards doing so. This was done on June 19th. That is my absolute recollection. Instead of saying June 19th, I should have said July 19th. My recollection of it is that it was on Saturday and I am positive it was either on Saturday or before Tuesday before we left. It was impossible that it be farther back one way or the other. Well, Mr. Root—in the first place I couldn't then take the mortgage and give back the checks. I needed the money, and he didn't know we could handle it or any means we could handle it, and decided when he would go he would be prepared to do it before going and if couldn't get the money otherwise then he would execute mortgage for the amount we might obtain or the amount we might think we could handle. Now, that is exactly— I went to Los Angeles and tried to see what I could do with the mortgage there. I did have a mortgage. Before he left—he drew it before he left [69] there, but it was not made until he left, because I had nobody in view. He wanted me to go and see a man in San Diego. I didn't go to see that man. I didn't know the people there, and I thought it would be hard to do anything with that kind of property there. That is a letter written to Mr. Root by me. (Letter marked #34.) (Letter of Mr. Root's, July 24th, marked for identification, read in evidence, marked #35.) About five or six days after reached Los Angeles made arrangement as to how much the mortgage should be. Probably the

(Testimony of Hugh Mackay.)

day before the 2d—then decided on that amount. The day before the 2d, probably. During the first—it was left until we found out whether money could be got in some other way. He expected some money and didn't know what amount should be made, and it was finally decided that it couldn't be more than that. (Letter to Mr. Root, August 1st, put in evidence, marked #36.) In statement of the payments made subsequent to the \$1,810, there was a note of November 24th, 1913, for \$450. Mr. Root received that money, but not at that time. That note he received it, I think, few days before then, and this is security I gave him. He got it on that security, and then I went and got that from him and gave the amount as a matter of security. That was the way that was. He got the full amount. On December 1st, 1913, there was a note likewise guaranteed by me for \$500. He got the money at that time. I gave him the other two checks myself, checks for them, the other two items, I think. I said I had to borrow the money to pay up that stock, got an option on it for sale, in order to get the balance for the mortgage. I went and borrowed the money for the ownership of the boats, and gave the bill of sale described in the letter which I introduced in evidence.

[70]

Redirect Examination.

This boat stock belonged to me. It was my own asset, and received the money on that transaction to pay on the second mortgage. That amount is included in the checks that I have testified as constitut-

(Testimony of Hugh Mackay.)

ing the amount of that mortgage. The first mortgage of \$16,000, the checks and amounts aggregating as claims, is over \$10,000. The items constituting the remainder of that, I can state exactly. I will give it to you here now. There were four or five checks that aggregated \$9,736.18. There was one for 750. I should say \$9,036.18 to start with. Then one for \$750. That check is not in evidence. Check for one thousand, July 24th. Well, I got interest. There is no more checks. Those are all the checks. The interest—one item, \$120.63. Interest on them checks at variance from long back, from August 2d, 1913. Some interest we fixed on checks before, and that was understood. Then comes interest on the \$14,000 loan, 6% from August 24th, 1913, together with extension of said loan for two years, \$1,680. Then there was 150 and 100. That is \$1,800.63. That is \$12,686.81. [71]

I had one charge of \$150 and \$100 paid Root for his account and that was a hundred and fifty that I figured he failed to deposit at one time and a hundred, something else. It was money that I paid out. The way I had paid out money that I paid out, trips from Cheyenne on account of Mr. Root's request, that is the way that was. That was \$250, and that leaves of the \$16,000, that leaves \$3000. It is \$3000 and the amount was dated April 22d, and the interest from that, on the three thousand from that date and one of two hundred and fifty, to August 2d, made \$63.19, and it was credited on the back of the note. This note for \$3,250 was not dated to make up these

(Testimony of Hugh Mackay.)

items that are still left, was not dated on the date it was given, but was dated back to April 22d. I credited the interest on the \$3,000 note from April 22d to August 2d. Defendant's Exhibit No. 12 is the amount that I credited, and that amount is \$63.19. The endorsement on the back of that note is the interest credited to August 2d, 1913, \$63.19. I included that in this statement. That goes to make up all of the \$16,000.

My understanding with Mr. Root in regard to that was that I pay three thousand dollars and I told Mr. Root if he would make a note and date it April 22d for three thousand dollars and I would charge up Root this twenty-five hundred dollars and interest to that date, and I would pay the difference in cash, and Mr. Root said that he would fix it up that way, and he says, "When I come back sometime, I will have money and I will just hand you the cash for that and you apply it on this." I then gave him the due-bill for three thousand dollars that would be due him on my return to Denver. The three thousand dollars mentioned is represented by Defendant's Exhibit No. 19.

The COURT.—This is not dated April 22d.

HUGH McKAY.— [72]

Mr. STONEMAN.—No, these notes are dated April 22d, notes for \$3,250. Here is the receipt of Mr. Root for that note, for the money, rather.

HUGH McKAY.—This amount, or this I. O. U.—well, when I got back I expected Mr. Root would be back in a day or so, but when he came back he went

(Testimony of Hugh Mackay.)

straight off East and I didn't see him and I had no chance to talk to him at the time and I had this five hundred and interest charged up, a separate and different set of notes, being secured by bonds. The bonds I testified to this morning had been taken by Mr. Root and sold. He paid so much on them, and I credited on this three thousand note there remaining unpaid on these two notes, \$2,568.40, and interest, \$50.43 on that to September 1st. \$2,168.30, that would make. That \$2,568.40 was the note that he owed me on that transaction in which he was to give me a bonus of twenty-five hundred dollars. That leaves a balance of \$439.56 that was paid. From November 26th to December 1st, I have Mr. Root items amounting to thirteen hundred dollars. On August 2d, there was a balance due Mr. Root of the difference between \$2,618.83 and \$3,000, and he also figured on the interest on three thousand dollars from April 22d. I gave him \$58.39 interest, and then kept interest going on the others and it left a balance of \$439.56 for me to pay. I paid in November \$1,300 which paid it up. I paid it that way, it applied on that and anything I would owe.

The COURT.—Before you get away from that, give me that note dated April 22d. Now if on August 30th, 1913, Mr. Root owed you this \$2,568.40 and the interest, why did you give him your note or due-bill for \$3,000?

Mr. McKAY.—Well, I told him that would do, that way. He told me, "Just you give me a memorandum of the amount it is and," [73] he says,

(Testimony of Hugh Mackay.)

“when I get to Denver and have money, I will hand it to you in currency and you can hand it back to me.” He had not ever handed me anything, but I had handed him \$3,000. But I had the notes, five thousand on which twenty-five hundred dollars has been paid; not in evidence, but I have been testifying about that. Plaintiff’s Exhibits “T” and “U” for identification, these are the notes which I have been testifying about upon which there was a balance of \$2,568.40 due to me. I suppose this is a mistake in date; I refer to the due-bill that has been introduced, which is dated August 30th, and that says September 1st. Plaintiff’s Exhibit “V” for identification, before I leave these notes, I got that from Mr. Root. I have paid him the twenty-five hundred dollars and the expenses connected with it. The checks are all there, checks on the National Bank. I made these endorsements that are made upon here. There is the endorsements that he made, himself, of amounts underneath there. That was the first endorsement pursuant to an arrangement with Mr. Root. The second one I just charged it up to him. The understanding was when he returned he would hand me the currency for it and I would hand it back to him, that is the way he put it. He called me up and went on east and he wasn’t back much before probably November. I told Mr. Root in regard to this. I told him that I would credit him with the amounts. I told him that in Denver after he came back there. Oh, I think it was probably

(Testimony of Hugh Mackay.)

six weeks or two months before he came back there. It has never been questioned by me.

(Plaintiff's Exhibit "V" read in evidence.)

Mr. ALDRECH.—It is obviously a mistake in that. It should be January 19th, 1913.

The COURT.—Give me that and I will change it. I will make [74] it read 1913 in red pencil.

Mr. HUGH MACKAY.—The balance that was then unpaid on the notes was twenty-five hundred and whatever interest there would be. That is the 2,500 that I offset against. At the time of the execution of this mortgage and at the time of the endorsement on these notes, the books had not been returned nor the balance paid. It was never paid in any other way than by the credit agreed upon between me and Mr. Root. When I was in Los Angeles, I wrote Mr. Root a letter in which I stated, date of August 1st, that I would leave for Denver at four P. M. I didn't leave until August 2d, I believe I left on the second. I credited Mr. Root with the amount that he owed me on that old transaction in which he agreed to pay me \$2,500 for the loan of the money or a bonus or commission or something, but not before I had talked with him about crediting him on that note. I had talked with him before he left. I told him what I wanted him to do in this matter and, of course, he did it, and he told me when he would come back, he would have money and he would hand me currency to pay this and I would hand it back to him on the other.

The COURT.—Oh, well, I cannot understand that.

(Testimony of Hugh Mackay.)

Mr. HUGH McKAY.—Well, I told him that I wanted him to give me credit for the amount due on these notes in this action, this old \$2,500 note. I wanted him to credit that on the due-bill. I said, “You give me a memorandum of the amount,” and, of course, I didn’t have these notes in shape there and he said when he would come back, he would attend to it. I credited the \$3,000 due-bill with this \$2,568.40 and interest, and when he came back and went east, I just charged it up. I had no further conversation with him before I charged it up, but I had afterwards at different times. He said, “all right.” [75] I still owe the balance on that yet, and I didn’t pay that until November. I paid it by giving him two or three checks. I didn’t say anything about the due-bill, about giving it back. I never talked about it, I don’t think. When I told him that I had credited him with the amount, my recollection of it is that he said that would be all right, anyway that—fix it anyway that was right. I credited it on the back of the notes and then in a little memorandum book I have there. I credited it when he came back. That would be about September 1st. It might be a day or two later from that date. This pencil endorsement is in my handwriting.

The COURT.—It does not seem to bear a date.

Mr. ALDRICH.—There is the date, April 22d, long before the transaction.

Mr. HUGH McKAY.—I had it charged up in the book in account, so many dollars and cents. The way it happened that the endorsement was dated

(Testimony of Hugh Mackay.)

April 22d, 1913, was that my calculation was that way, at the same rate of interest and the interest on the \$3,250 so much of it would come at the same time, that was the reason I did it. I gave him something that bore interest and I noted the interest on this to apply from that date, you see. There was no one present when I had the conversation with Mr. Root in which I told him that I had charged him up with this \$2,618.18. I gave this due-bill on the date he left Los Angeles, and I got a note at this time, the \$3,250 note. I also got the mortgage on that date. The mortgage was for \$16,000. It was August 25th. There is the \$3,000 note, that is the one we are talking about, and the \$250 is in cash. I owed him \$3,000 after he gave me the note, note before, and I gave him my due-bill. He owed me [76] \$13,000. And I gave him a due-bill for \$3,000 to make up the difference. That is the difference right there, that 3,000 that I had offset with the notes here, you see.

The COURT.—Now, then, you claim there was another transaction in which it was agreed you might retain that mortgage to secure the several sums you say are represented by this mortgage. What I am asking you is what evidence you have to give corroborating your statement that there was any such agreement made?

Mr. HUGH McKAY.—Well, if it wasn't so I would be wanting to keep it nor anything else, and I so advised Mr. Root. It was absolutely understood. That is how I came to get these notes. I wanted Mr. Root to give notes to represent the

(Testimony of Hugh Mackay.)

amount of this note and mortgage to secure it, because I considered his personal note would make him more careful probably to get the money. This mortgage was delivered to me on August 2d to sell. It was delivered to me as my own on the 25th or 26th of August.

The COURT.—What do you mean by being finally delivered? Did he return it to you or you return it to him?

Mr. McKAY.—Well, I took it right there. I went back to the hotel, to Los Angeles and we fixed the matter up just as it stands now and I took it to secure it, and it was done right there. These notes were made and the mortgage held and given to secure the amount and notes represented. It was turned right down there on the desk, and, I can't sell it, I will do so and so, and all right, it was fixed that way. After that, I took it along and held it for that purpose. Mr. Root was the man that agreed to take all—I surrendered the checks for it, the checks that we had on the bank. I surrendered those [77] checks for the mortgage security right on that day in Los Angeles, the twenty-fifth of August, 1913.

Cross-examination.

This endorsement in my handwriting purporting to give Mr. Root credit for \$1,284.10 on this note was not made on April 22d, 1913—exhibits “T” and “U.” It was made at the time I came back. It was not made while I was in Los Angeles, because I didn't think that I had it with me. I made it after I came back a day or two, something like that,

(Testimony of Hugh Mackay.)

and the purpose of dating it back to April 22d, as I have understood it, was to stop the interest on my due-bill so that—not to stop the interest on that, because I would be paying interest on the other note and that was my way of doing it, either way. I gave credit from April 22 to August 2d to him in accounting for the three thousand, you see. This did not represent those credits. They did not represent cash. Those credits there, it don't represent the bonus, it is part of the transaction. I didn't advance it on those notes, (exhibits "T" and "U"), as I told you, I advanced it to Mr. Root for a certain purpose and this is what he gave me for it. I was not buying notes at that time. I don't know whether I showed the endorsements to him. It was a long time since I saw him, and when I did see him, was in a hurry. He hasn't been back for a long time. The endorsement also on the back of this receipt for the bond for Mr. Root, that was made by me also. I made a memorandum there that I had put the amount represented by the balance on these notes to his account on April 22d, because he did not return the bond nor pay the money as he agreed to. [78]

Testimony of F. M. Lowry.

F. M. LOWRY.

Direct Examination.

I have made a computation of the principal and interest on the two mortgages and the three notes that have been introduced in evidence in this case. The amount of the first mortgage and note at the present

(Testimony of F. M. Lowry.)

time, principal and interest, is \$17,974.19. The principal and interest on the two notes and the mortgage on these two notes at the present time is \$5,418.54. The total amount, principal and interest, of the two mortgages and three notes, principal and interest is \$23,392.73.

My name is Frederick W. Lowry, I reside in Denver, Colorado. I am engaged in the last few years in the handling and development of irrigated lands. I have been acquainted with Mr. R. T. Root for more than thirty years. I was admitted to the bar back in Iowa back in 1893 and 1894. I have not practiced long. I was in the employ of Mr. Root for a number of years. I never acted in the capacity of his attorney. Of course, I gave him the benefit of such legal knowledge as I may have had. I was never admitted to the bar in the State of Colorado. I have never practiced law there. Mr. Root often sought my advice; I couldn't say that he acted on it. I was in his employ continuously from 1894 until 1909, October, I believe it was, 1909, and not after that time. I did considerable business for him after that, helped him out in his affairs more or less, and I received some compensation. I left his employ in 1909, in the fall, to go to California. I came back in February, 1910, just a few months afterwards. Now, at different times after my return I performed services for Mr. Root, but not continuously, now and then, sometimes for a period of weeks. I presume it is safe to say that Mr. Root sought my advice in nearly everything. The relations of Mr. Root and

(Testimony of F. M. Lowry.)

Mr. McKay, and to the question of his borrowing money, [79] some money, and so on and so forth, I knew about it. I was consulted about it by both sides, by Mr. Mackay and by Mr. Root. I saw Mr. Mackay as agent representing Mr. Root on many occasions. I think Mr. Root had me take certain trips and paid my expenses, I recall one at any rate.

Mr. ALDRICH.—I submit this witness is not competent as a witness, your Honor, and am prepared to argue the question.

Mr. LOWRY.—I was secretary for Mr. Root during this time. I was not practicing law. I was not employed by him as an attorney in any respect at any time. In cases that he needed counsel or attorneys, it was his practice to employ an attorney. I did not act in the capacity of an attorney. We always had several on the staff. At no time was I employed by him as an attorney or in that relationship in any way.

Cross-examination by Mr. ALDRICH.

It is true that I was paid a thousand dollars in connection with the Moffat settlement. It is probably true that I may have said that I thought I knew something about the law, even if it might not be conceded that I was a judge of the law, but I did not act as his attorney in any of those relations or in any of that work. I may have acted as attorney *as attorney* and Mr. Root's legal advisor, consulting authorities and talking with him, telling him what the authorities were in connection with matters at the time this controversy arose.

(Testimony of F. M. Lowry.)

Mr. ALDRICH.—I renew my objection.

The COURT.—What were you paid a thousand dollar fee for?

Mr. LOWRY.—Mr. Root got into difficulties with the estate of David H. Moffat after the death of Mr. Moffat. There were large interests involved between them, involving the expenditure of approximately half a million dollars. The books [80] and accounts and records of Mr. Root covering these transactions had never been gotten in proper shape so he could make an accounting. There was none that, as Mr. Root conceived, could do that work and put the things in proper shape to make a showing in connection with the Moffat estate, except myself. Mr. Root came to me and asked me to undertake that work. I finally consented to give him a limited amount of time to put these matters in such shape that he could make an accounting. Now that work did not involve a long period. It was not the amount paid me—it was really worth more than a thousand dollars—that was not fixed on account of the value of services, but on account of loss in time that I needed. The service consisted of getting up these books and accounts, going into them, checking data, getting them in shape so he could make a clear explanation of the estate of Mr. Moffat as to the worth of accounts between Moffat and Root. I was acting more in the capacity of an auditor than anything else. I am a pretty good accountant, and have done similar work to that before. I did not charge him a thousand dollars, Judge. The matter was his own

(Testimony of F. M. Lowry.)

offer. It was for this work covering quite a period of time. I was supposed to be the best man to do the work because I was the only one outside of Mr. Root himself that was familiar with all of the transactions from their inception. I was in Mr. Root's employ from 1894. I had charge of the corporate books in all of the corporations and of his individual accounts; was familiar with all the items and the business transacted in the name of those corporations. I do not recall receiving fees at any other time. I had received compensation, of course, when I was in his employ regularly.

The COURT.—I understood you to say, in reply to a question propounded by counsel that you may have received fees. [81]

Mr. LOWRY.—I was constantly, at different periods for a few weeks at a time assisting Mr. Root off and on after I left his employ from 1910 on my return from California down to last fall. It was in various mines work, but it was help and assistance rendered to him in the difficulties he had gotten into in the Moffat estate and with others. I ran across legal propositions that he consulted me about, and looked up authorities and advised him. I went to lawyers' offices to consult the authorities, and sometimes he acted upon my advice. Oftener he did not. He consulted his lawyer and finally determined whether or not to act upon my advice. He had several lawyers always. During the period that I am about to be examined upon here on behalf of the complainant, I think I consulted with him on

(Testimony of F. M. Lowry.)

that and he consulted with me in regard to almost everything. He consulted with me with reference to holding this meeting of the corporation that has been referred to. That is, at the time it was held. I do not mean to say that he consulted with me before it was held as to whether it should be held. I was not paid anything for that service. I was consulted as a director and officer of the Norma Mining Company, and to procure my assistance in getting this thing through with Mr. Mackay. I was not paid anything for that service.

The COURT.—The witness will be permitted to testify as to all transactions except those in which Mr. Root consulted him as to the law and in which he advised him what his opinion of the law was. As to those matters he will not be permitted to testify.

Mr. ALDRICH.—If the Court please, I want to note an exception even to that. I think the rule does not go so far as your Honor is permitting. It is not a question depending upon whether he is paid.
[82]

The COURT.—No, I agree with you. It does not depend upon the question of whether he was paid, but upon the question of whether or not he acted in a professional capacity.

Mr. ALDRICH.—I think it is a line very hard to draw.

The COURT.—Very well, the reporter will note the exception. (To the Witness:) In these transactions in which he consulted you and you men-

(Testimony of F. M. Lowry.)

tioned authorities and you gave him your opinion as to what the law was, you should not testify about, and when counsel asks you about any such matters as that the Court will rely upon you to state that that comes within the rule of the Court, and not answer the question.

Mr. LOWRY.—I am acquainted with Mr. Walter Root; he is the son of R. T. Root. I am acquainted with Mr. Herbert M. Root; he is a son of R. T. Root. I know Mrs. Root, wife of Mr. R. T. Root. I have known all these people twenty-five or thirty years; Mr. Root longer than the others. I know of the properties situated in the White Hills Mining District, Mohave County, described in the complaint in this case, and can give a brief history of these properties and the transfers.

The COURT.—I understood you to object to all that and objected to the introduction of the conveyances of the property of the corporation, did you not?

Mr. LOWRY.—No, sir; not that I know of. I do not remember that.

Mr. ALDRICH.—If the Court pleases, I want to have the record show that I am objecting on the ground that it is not in rebuttal of anything that has been offered, and on the further ground that the records of this state will show that Mr. Lowry participated in the trial of a case regarding the titles of the property as attorney for Mr. Root. [83]

Mr. LOWRY.—I remember participating in a case that was tried at Kingman, but I do not remember

(Testimony of F. M. Lowry.)

that I participated as an attorney. I remember being present at the trial, but not as an attorney of record. I undoubtedly took part in that case so far as handling it is concerned. I did not argue any questions of law. I do not recall at this time of being, on motion of Judge Hawkins associated with him in the trial of the case. I was a witness in the case. I do not think I examined any witnesses.

The COURT.—Well, if this witness has no better recollection of the facts or fact of what occurred, I would not permit him to testify as to any transaction involved in any conveyance of the corporation. He does not state he did not participate as attorney.

Mr. LOWRY.—I certainly did not try one case alone. I do not recall advising Mr. Root that Judge Hawkins was ill and that there was something the matter with him, that he trembled, and that I took charge of the introduction of papers and evidence in the case. The case that I have in mind was tried before Judge Sloan. I was present as a witness at some of these cases and also in the preparation for trial, but not as an attorney in the cases.

The COURT.—You participated in preparing the authorities and the propositions of law?

Mr. LOWRY.—Yes, sir, I did.

Mr. ALDRICH.—I renew my objection.

The COURT.—I will sustain the objection.

Mr. LOWRY.—This is the White Hills Mining Company, a different corporation from the Norma Mining Company that this litigation occurred about.

(Testimony of F. M. Lowry.)

The COURT.—Anything that relates to any transaction between the Norma Mining Company and the White Hills Mining Company alone this witness will not be permitted to testify to.

Judge BAKER.—Exception.

Mr. LOWRY.—I am acquainted with the Norma Mining Company. It was organized or incorporated in 1905, July 1st. The original and first directors of that company were R. T. Root, Walter W. Root and myself. The capital stock of the corporation was five hundred thousand shares divided into five hundred thousand shares of one dollar each.

Mr. ALDRICH.—At this point I desire to again object and to ask the witness whether he did not, as attorney, prepare the articles of incorporation?

Mr. LOWRY.—I prepared these articles of incorporation.

The COURT.—I will sustain the objection. I think he was acting as a lawyer.

Mr. LOWRY.—I was a director, vice-president and secretary of the Norma Mining Company. I became secretary of the Norma Mining Company at the first meeting, July 3d, 1905—July 1st, 1905, probably. While I was secretary, three hundred thousand shares were issued. Three shares, qualifying shares, for the directors were issued July 1st, 1905, one to R. T. Root, one to Walter W. Root, and one to myself. My own share was endorsed and left in the book. My recollection is that the share issued to Walter Root was the same, and the one to Mr. Root the same, except Mr. Root's was

(Testimony of F. M. Lowry.)

not endorsed. On July 3d, there were two certificates aggregating 299,997 shares that were issued in the name of E. G. McDermott. They were endorsed in blank by Mr. McDermott and delivered to Mr. R. T. Root. I know about the history of those shares after they were delivered to Mr. R. T. Root.

[85]

Such information as I have on the subject was derived by reason of the opportunities that I had in his service to observe what was done and what was said.

At the time of the inception of these transactions, it was distinctly understood between Mr. Root and Mr. Mackay and myself that I should represent Mackay in that transaction, and that relationship has continued in a greater or less degree ever since that as to Mackay.

The COURT.—I will sustain the objection to this witness' testimony.

Judge BAKER.—Exception.

Mr. LOWRY.—I was to represent Mr. Mackay from the beginning of the inception of these mortgages, in July, 1913. I have not represented Mr. Root in regard to these mortgages, but have represented Mr. Mackay so far as it was possible in connection with the fact that I was a director of the company from that time on. The two men came to my office in July, 1913, with the explanation. Mr. Root proposed, in the presence of Mr. Mackay, that I should represent Mackay, because Mackay had expressed an unwillingness to trust him in preparing

(Testimony of F. M. Lowry.)

these papers and seeing they were properly authorized and executed, and at that time, I expressly asked Mr. Root if he was willing I should help Mr. Mackay, and Root said he was, and Mackay said if I couldn't represent him that he would go to a mining attorney. Mr. Root was anxious that I represent Mackay, because he wanted the deal to go through and Mackay was anxious that I represent him, for other reasons. That was the inception of the thing. No, not as attorney. Well, I don't know. I was to give him the benefit of such legal knowledge as I had, undoubtedly. I was not a practicing attorney. The position was this: that at that time, I was [86] a director and secretary of that company, and Mr. Mackay was willing to trust Director Lowry and was not willing to leave those matters go to the president of the corporation, Mr. Root. That came out very fully at that meeting.

Mr. ALDRICH.—That is all subject to objections, your Honor.

The COURT.—The very fact that this witness said or asked Mr. Root the question whether or not he, Mr. Root, was willing that he should represent him, I think, up to this time, at least, up to the time it was agreed, if it was so agreed, that he should represent Mr. Root, shows that their relations were those of attorney and client and comes within the rule.

Mr. LOWRY.—My resignation was signed and left undated in the minute-book of the company from the time the corporation was first organized.

(Testimony of F. M. Lowry.)

I acted as secretary and director of that company.

Mr. ALDRICH.—To that we object, if the Court please.

The COURT.—Objection overruled.

Mr. LOWRY.—From the time of its organization until sometime in the fall of 1913. I kept the minutes of the Norma Mining Company. The minutes of the corporation, entered on the books, appearing at pages 12 and 13 of the same, are in my handwriting. Two meetings of the board of directors of the Norma Mining Company were held from its first inception up until July, 1913, excluding the meeting of July, 1913. Those two minutes, those two meetings appear upon that minute-book. The first meeting begins on page 7, and the second meeting begins on page 12. I saw this minute-book prior to this trial, about the middle of last year, 1914, in the office of Mr. Root—in the office of the company. I at that time examined the book. There was not a record [87] in that book of minutes as they appear now from pages *pages* 15 to 17. I did not call Mr. Root's attention at that time to the omission of the record of any meeting or of minutes of a meeting of the directors and stockholders held prior to that time. I saw the minute-book about the 1st of September, 1913, and at other times where I cannot fix the dates, between that and the middle of 1914. At the time that I saw the book in September, 1913, the minutes, as they now appear upon the book at pages 15 and 17, were not written out on the book, that is, 15 to 17, inclusive. Mr. Root wasn't there

(Testimony of F. M. Lowry.)

when I saw these notes in September, 1913. The minutes of July, 1913, meeting were in the book in typewritten form, loose leaf, not written out. The minutes were there of my own, in a loose form, of the July, 1913, meeting, but not recorded. In July, 1913, there was a meeting of the stockholders and directors of the Norma Mining Company.

Mr. ALDRICH.—We are objecting, if the Court please, to all this testimony.

Mr. LOWRY.—It was held at my offices in the Colorado Building, Denver. There was present at the meeting, R. T. Root, Walter Root, myself and Mr. Mackay. I was to represent Mr. Mackay beginning on this date.

Mr. ALDRICH.—Mr. Reporter, note an objection on our part to all testimony relating to the alleged meeting of July, 1913, and also a motion on our part—

The COURT.—The objection is overruled. Note an exception.

Mr. ALDRICH.—Yes, and we now move to strike out everything that the witness has said upon that subject up to this point.

The COURT.—Motion is denied. [88]

Mr. ALDRICH.—Exception.

Mr. LOWRY.—Mr. R. T. Root and Mr. Mackay came to my office in the morning of the 19th of July. Mr. Root said that Mr. Mackay was demanding that he, Root, should pay certain checks that he had given to the estate of George Miller, aggregating the sum of \$11,000, that he did not have the money to

(Testimony of F. M. Lowry.)

pay them and if given a little time, he would get it; that in the meantime, he proposed, in order to secure Mackay, to have the Norma Mining Company give a mortgage to Mackay. Mackay insisted or said in my presence that he did not want the mortgage, that he wanted the checks paid up, and Mr. Root insisted that the mortgage would be ample security. Mr. Mackay then said to Mr. Root, "Even if I take a mortgage you would tie some string to it so it would not be good." Mr. Root replied, "You would be willing to trust Mr. Lowry for the preparation of the papers and to see that everything was taken care of in proper form?" and Mr. Mackay said that he was willing to trust Mr. Lowry. Now, that was the beginning of this meeting. In the afternoon of that same day, we convened again. In the meantime, I had seen Mr. Mackay privately and I had seen Mr. Root privately and discussed certain things in regard to the necessity for certain forms to be allowed. Now, I went out of town the next day. The next day was Sunday, and I went up in the mountains. I returned in the evening of the 21st. The following day, or the 23d, we had another meeting at which Walter Root and R. T. Root and Mr. Mackay and myself were present, and at that meeting, I wrote up the minutes, prepared them there in short form, for the adoption of the resolution authorizing the mortgage, or mortgages to be issued to Mr. Mackay in any sum up to the extent of \$25,000, showing that the consideration that the company was to receive was to be the cancellation

(Testimony of F. M. Lowry.)

of the indebtedness of the company to Mr. [89] Root in an equal amount for whatever the mortgages were issued, that when they were issued the amount of their face was to be credited upon the indebtedness of the company to Mr. Root. Now, these resolutions were put into the form by me of formal minutes, as formal as we usually keep them. The resolution was adopted by a unanimous vote. The loose form of it was in typewritten form in this book, not pasted in, but to be written in afterwards. I have the original draft of the resolution itself here present, marked Plaintiff's Exhibit "W" for identification. It is the original manuscript draft of my minutes of that meeting of July, 1913, and it was the resolution that was adopted at that meeting at which Mr. Walter Root, Mr. R. T. Root and Mr. Mackay and myself were present. I was secretary and a director and vice president of the corporation, and Mr. Walter Root was a director of the corporation, and Mr. R. T. Root was president. That constituted the entire directorship of the corporation.

(Plaintiff's Exhibit "W" for identification offered in evidence.)

Mr. STONEMAN.—To that offer we enter an objection that the purported resolution and record of minutes of that alleged proceeding are invalid for any purpose in that the minutes do not show the total number of shares outstanding. They do not show what shares were present in person or what shares were represented by directors. They do not

(Testimony of F. M. Lowry.)

show that the shares of stock were noted as shares at the stockholder's meeting. On the contrary, they *purport show*, if anything, that it was a *vive voce* vote. It does not show that the meeting was held on the 19th of July, 1913, or on a holiday. On the contrary, it shows that it was some blank day in July; and for these reasons, which occur to me at the present time after a cursory inspection, we [90] enter the objection if they are offered for the purpose of showing any legal action taken by the stockholders of the Norma Mining Company in the execution of the mortgages.

The COURT.—These minutes are not signed.

Mr. LOWRY.—That is merely a manuscript, first on this page shorthand minutes, then copied in manuscript on that page. These are not the final minutes, but my draft of the minutes which were afterwards typewritten. They were drafted, as I recall, either on the 22d or 23d. I do not recall why I did not date it.

The COURT.—Yes, it shows that Root, Lowry and Root were present, and the minutes of the stockholder's meeting, if they are the minutes, show that all shares were present. "All shares being present," it says. I will overrule the objection and admit the memorandum for the present, subject to the defendant's objection.

(Plaintiff's Exhibit "W" read in evidence.)

Mr. LOWRY.—Mr. Root at that meeting said that he owned all of the shares of the corporation outside of the directors' shares, and produced certificates

(Testimony of F. M. Lowry.)

at this meeting assigned in blank.

Mr. STONEMAN.—We move that the answer be stricken out for the reason that it is not competent for the purpose of proving the ownership of the shares or the right of Mr. Root at that alleged meeting to vote the shares.

The COURT.—It might be a circumstance for the Court to consider. The objection is overruled.

Mr. STONEMAN.—Exception.

Mr. LOWRY.—The minutes of the July meeting were typewritten afterwards. The work was done in my office. I do not recall who was our stenographer. I think it was a Miss [91] Saunders. She is in Colorado. Any copies that I had were put in the minute-book in Mr. Root's office, carbon copies as well as the original. I was representing Mr. Mackay at that—time and did not retain a carbon copy. I do not think it a strange proceeding for a man representing another person. I had confidence in both parties. I had confidence in Mr. Root and in Mr. Mackay and I knew the circumstances of the ownership of that stock and I did not believe there would be any trouble. I could produce a certified copy of the resolution. That was not our custom. Sometimes I wrote them in immediately and at other times I put them in a box to be filled out at another time. That was against our rules to paste anything in the minute-book. It was our custom to leave it loose, and I felt perfectly safe. I did not have the directors sign these minutes then. They couldn't at the time, they were not officially

(Testimony of F. M. Lowry.)

drawn up. I think they were signed; I am not sure. Mr. Root produced the shares at the meeting. I saw them. He had two certificates aggregating 299,997 shares and he had his own certificate of one share. These certificates of 299,997 shares, Mr. Root had at that time were the original certificates that had been issued to Mr. McDermott by me. I had signed them as secretary. They were in my handwriting. They were issued in July, 1905, July 3d. There appeared on the back an endorsement in blank, usual form, assignment signed by E. G. McDermott; no name written in the blank. I was acting for Mr. Mackay in reference to these mortgage transactions, after this meeting in July, 1913. I saw Mrs. Root July 24th, 1913, at the train starting to California. She was going to Los Angeles. Mr. Root and Mr. Mackay were with her, and I had a conversation with Mrs. Root at that time. [92]

This conversation was in reference to the \$16,000 mortgage. I do not recall the words, but the purpose of the trip to California was discussed with her, and hope expressed by her that it would be successful. The purpose was to place, was to procure money on this mortgage. I couldn't say what she said.

Mr. ALDRICH.—We object, if the Court please; leading; also for the further reason that it is immaterial and irrelevant. Our position is that no matter what the stockholders know with reference to transactions, they cannot even by their vote make an ultra vires act good. We insist that there was

(Testimony of F. M. Lowry.)

never any indebtedness to Mr. Root, never any indebtedness of any kind to Mr. Root, and in the absence of indebtedness, where there is no doubt that the corporation had no capacity even if everybody concerned in it gave their consent and voted for it. Even if he owned the shares himself.

The COURT.—Overrule the objection.

Mr. LOWRY.—I cannot attempt to repeat the conversation, but I can repeat the purport of it, that I discussed with Mrs. Root the purpose of that trip to California. They were going to California to get money to pay off those checks and to get it upon the mortgage which had been authorized and they hoped to sell it for \$25,000. I know the land or property that has been described as the Boulder Farm, in Colorado. I know the value of that farm.

Mr. STONEMAN.—If your Honor pleases, may we ask the witness if his knowledge of that farm has not been obtained under his own testimony while he was acting as attorney for Mr. Root? We submit, if your Honor pleases, that it must have been, because that transaction long antedated July 19th, 1913, and we do object and base our objection on the ruling [93] of the Court.

The COURT.—I will overrule the objection.

Mr. LOWRY.—Its maximum value is \$15.00 an acre. It is 120 acres of land that lies above the level of irrigating ditches, shallow soil, rocky, has no water-right, so situated physically that it can never procure water, nothing to pasture on. Subsequent to the execution of the mortgage, of the \$16,000

(Testimony of F. M. Lowry.)

mortgage, I had a conversation or conversations with Mr. Root in May, the 31st of May, in New York City at the Belmont Hotel. That was the first time I recall discussing this mortgage with him after the execution, in the year 1914. I was not in his employ at that time. I cannot repeat the exact words, but the matter was discussed. It is true that he paid my expenses. I went there in response to a letter from Mr. Root requesting me to come, and the purpose of the trip was that he might induce me to render him service, which I refused. That was the sole purpose, of making that trip to New York. Mr. Root said in substance that the mortgage aggregating \$21,000 to Mr. Mackay were good security, that Mr. Mackay had no occasion to worry, as they would be paid in full, that all he needed was time to turn in. The Norma Mining Company was mentioned as being the company having made the mortgages. I had frequent conversations in reference to this with him in September, 1914, at Chicago. I went to Chicago at the expense of Mr. Mackay and to represent him in trying to put through a deal with Mr. Root involving the transfer of an equity in this property either to Mr. Mackay or to a corporation which he might organize, in payment for approximately \$35,000 of claims against Mr. Root held by creditors in Denver, Colorado. I submitted to Mr. Root a statement of account between Mackay and himself and discussed [94] that so as to ascertain the amount that was due between them, because he at once disputed an item of \$3,000.

(Testimony of F. M. Lowry.)

Mackay had not made it clear to me and I went into that. Mr. Root refused the proposition which he made for the transfer of that equity. He offered a counter proposition to me along the same lines but involving the procuring of a cancellation of further indebtedness against him. He said that the mortgages were perfectly good and would be paid in full as soon as he could make a turn. That he was trying to procure a larger sum through a friend of his by the name of Huron, I believe, that he expected to procure a mortgage for \$50,000 and out of the proceeds of that, he would pay off the \$21,000 mortgage to Mackay and have something left for himself. The matter of the \$3,000 due-bill came up for discussion between him and me, because I was unable to understand Mackay's account of it, and Mr. Root himself said at that meeting that the \$3,000 represented by the due-bill was never received by him in the form of checks in the George Miller estate, and I was trying to get the matter straightened out. I could not understand from either side. He said that the mortgage was for \$16,000, that there was checks approximating \$11,000 to the George Miller estate, and that there was items of interest on the so-called Lowry loan and some other items which brought the amount that he had received at that time up to \$13,000, but that the \$3,000 he held Mackay's due-bill for against it Mackay had offset some notes of the Treasury Mining and Reduction Company endorsed by him upon which—well, he said he was personally liable.

(Testimony of F. M. Lowry.)

He did not pretend that he ever got the money from the George Miller estate. He said if there was trouble with the Miller estate, that he did not want to get in shape so that he might be accused of having received more in checks from that estate than he had received. That [95] the \$3,000 was another matter between himself and Mr. McKay and the Norma Mining Company and Mackay, that the entire \$16,000 was all right, would be paid, but that he did not want to put the \$3,000 in the same shape as the checks from the Miller estate for fear of liability to that estate, that is, liable to be brought into court for getting the funds of that property. I had frequent conversation with Mr. Walter Root, one of the directors, subsequent to the execution of this mortgage, about the \$16,000 mortgage and \$5,000 mortgage.

The COURT.—I do not know how far your general objection goes. I would like to know from counsel whether they are making any objections to this line of questions.

Mr. ALDRICH.—We are making objection to this witness testifying at all, and to everything that he says about the parties' relations.

The COURT.—I will sustain the objection.

Exception.

Mr. LOWRY.—My resignation as secretary or director of the Norma Mining Company, which I executed on the formation of the company, was never acted on by the board of directors prior to July 19th, 1913. I was never notified by any person that my

(Testimony of F. M. Lowry.)

resignation had been accepted up to this time. There were no shares in the meeting of the board of directors of the Norma Mining Company held on the 15th of July, 1911. I was never notified of any such meeting, not present at any such meeting. I did not write the minutes that appear upon this book as secretary, as of July 15th, 1911. I know how the Norma Mining Company was operated, who operated it, who paid its expenses and had the entire management and control of the corporation from 1905 to 1913. It was Mr. R. T. Root. [96]

Cross-examination.

Mr. LOWRY.—I understand shorthand; I can operate a typewriter. I have practiced doing that a good many years ago. I have occasions to do it now. In the beginning of my employment with Mr. Root, it was almost all of that. The record-book at the time of this alleged meeting of July 19th was probably at the office of Mr. Root. I do not recall taking it to my office. I would say that it was not at my office. I put the loose leaf of this typewritten copy of the minutes in that book about the 1st of September, 1913. Mr. Walter Root and Mr. Mackay were there and knew of it. It was upon the occasion of putting the seal upon this first mortgage. It was about the 1st of September, 1913. The seal of the corporation was in the office of the company, which was Mr. Root's office. I was supposed to have the custody but it was not actually in my possession. It was not in my possession after I quit Mr. Root's office. I had an office of my own.

(Testimony of F. M. Lowry.)

I was out of his employ in 1909 and opened up an office for myself in February, 1910, but continued to act for Mr. Root after that in certain things, and continued to act as director and secretary of the company.

There were no other minutes in the record and laying in the book at the time I put it in. The presumption that I have in my mind is that I made a carbon copy of this. I have searched my office very carefully for a carbon copy, anticipating there was one and it was in my possession, but have not found any. My note at the top of these minutes show that a carbon was to be made and I expected to find that carbon in my office. I prepared the minutes introduced in evidence, first in shorthand, then in manuscript, then they were copied by my stenographer, Miss Saunders. She is not now in my service and has not been for some time.

I prepared a mortgage for twelve thousand five hundred [97] dollars and submitted the form to Mr. Root. It was not executed. It was the understanding that the mortgage was authorized and they would execute it, if it was executed, out there. Mr. Root was not satisfied with the form that I had prepared. I know how much the authority was. I knew what was the expectation when they left for California, as to the amount. I prepared a form after the meeting. It was delivered to Mr. Root. That was typewritten, I think, by my son, but I drafted the mortgage. I have no copy of the mortgage. As I recall it, it was on a printed blank, the

(Testimony of F. M. Lowry.)

blank description and everything else being filled in on the typewriter. I remember insisting sometime after the Moffett trouble that my resignation should be accepted. There was no time in connection with the Moffett matter that I made that request, it was at a later date. I began to request the acceptance of my resignation from all of his companies as early as 1912. As to what time in 1912, I do not know, but not before 1912. Six months or later after Mr. Moffett's death there were questions which required very careful consideration. I was right in the midst of it with Mr. Root. It was my habit to form an independent judgment as to what ought to be done, both as to the questions of fact and of law, and that then to submit it to such counsel as Mr. Root might designate, that was my general practice. There were charges against The Norma Mining Company on account of operation.

There is no report that I ever signed that would show that The Norma Mining Company was not in debt. Any money that was expended on that property was to be repaid. It was merely entered upon the books as an account showing what expenditures had been made, between Mr. Root making the expenditures and the corporation. It was regarded at all times as an indebtedness of the corporation to him. [98]

There were books kept prior to Mr. Moffett's death. One was a small book about like that minute-book that has been introduced in evidence. It was marked on the outside, if I recall it, "Arizona

(Testimony of F. M. Lowry.)

Business." There was another book of about the same character that carried the transaction down from where the first book left them, to approximately January 1st, 1913, which, as I recall, was marked on the outside, "White Hills Business." The name of the Norma Mining Company did not then appear on the outside of the books, and I do not think it was on the inside. On January 1st, 1912, fixing that as a date where I knew the sum, The Norma Mining Company was indebted in the sum of thirty thousand, five hundred and some dollars. Now, that included interest upon the items. That is the way we figured it when it became involved or there was a possibility of becoming involved with the Moffett estate and it was necessary to figure what that indebtedness was upon this White Hills business—thirty thousand, five hundred and some odd dollars.

I was trying to sell the Boulder Farm for Mr. Root some time after I returned from California in 1910, and I think I made another trip to Boulder to look that up later on, a year or two later on. There is about three acres that comes under the ditch, but the land does not own the water-right. It cannot get water unless they pump it. It would be necessary to lift it if it were pumped from the corner possibly thirty-five feet. It is about two miles and a half, as I recall it, from Boulder. Really none of it is irrigable land. It is shallow soil and covered with boulders and rocks. It is not land that could be cultivated, except those two or three acres

(Testimony of F. M. Lowry.)

that lie where the ditch comes across. I think he paid about \$20,000 for the land, his total payments were \$27,000, that is my recollection, and at one time after he had made a partial payment, he sought my [99] advice as to whether or not he had better go on and complete the payments, and I advised him to complete the payments, but not on account of its value as agricultural land.

Redirect Examination.

Mr. LOWRY.—The reasons why this land, this Boulder farm, was purchased by Mr. Root, was they thought and hoped it was oil land. There had not been any production of oil very close to this property, not close enough to give it the value they were then demanding for it.

Those books I have testified about on cross-examination of The Norma Mining Company, I presume are in the possession of Mr. Root. I don't know.

This property described in these mortgages was generally referred to as the White Hills properties. It would be the same properties mentioned in these mortgages.

Testimony of W. D. Griermann.

Direct Examination.

W. D. GRIERMANN.—My name is W. D. Griermann, and I reside at Altadena, California. I have known Mr. R. T. Root about eight years, seven or eight years. I saw Mr. R. T. Root in Los Angeles, in August, 1913. On July 28, 1913, Mr. Root called me up on the telephone and asked me to come to

(Testimony of W. D. Griermann.)

Los Angeles or asked me if I was coming, and he said on that day. And he said over the telephone that he was at the Alexandria Hotel in Los Angeles, and he asked me if it would be convenient for me to see him there, that he was anxious to see me, and I said I was coming over and would see him. When I saw him he asked me if I would go to San Diego with Mr. Mackay to see a friend of mine and try to get a [100] loan from him. He said. "We will give good security, will give a mortgage on the White Hills property in Arizona, and we want a loan of \$25,000, or want \$25,000 on that property. That is worth several times that amount, or a good many times that amount." He said that in order that there might be no question in regard to the legality of the transaction, he held, he called a meeting of the board of directors and had a resolution passed authorizing such a loan, although he said it was not necessary to call a meeting because he owned all of the stock. I know Mrs. Root, the wife of R. T. Root. He said, in order to avoid, he simply repeated it in different words, in order to avoid the possibility of any technical objection on the part of the party who might want to make the loan, he had this resolution passed, although he did not consider it necessary because he owned all of the stock. I saw Mrs. Root in California at that time, that same day on July 28th, 1913. Mrs. Root said that Mr. Root owned a great deal of property which was not bringing in any money, and that he was in need of money, and that if I would assist them to get a loan

(Testimony of W. D. Griermann.)

on the White Hills property they would soon be able to pay me money that was past due. That was the substance of it.

In 1914 I saw Mrs. Root in New York City, in June and July. At that time I complained of not having received the money that was due me and I needed it very badly and expressed some fear that Mr. Root might lose some of his property, and I asked Mrs. Root if Mr. Root still owned the White Hills property, and she said, "Yes." She was not claiming to be interested herself personally in any way in the property. Nothing was said in that conversation in reference to the mortgages that have been introduced in evidence in this case.

Judge BAKER.—The plaintiff rests its case.
[101]

Mr. STONEMAN.—We move on the ground that we have been surprised in the evidence which has been introduced and upon the showing that there has been no want of diligence in the preparation of this case on our part, for a continuance for a sufficient number of days to enable us to secure the presence here from Denver of W. W. Root, who if present as a witness, will testify there was no such meeting held in Denver on July 19th, and that the record of the meetings of the stockholders and directors, as they appear upon the minute-book introduced in evidence in this case and marked as an exhibit, is a true record of all the proceedings had at all meetings of the stockholders or directors of The Norma Mining Company.

(Testimony of W. D. Griermann.)

The COURT.—Have you, gentlemen, reached any agreement as to when the trial of the case may be resumed?

Judge BAKER.—At any date your Honor may fix after the 1st of October.

The COURT.—That is satisfactory to you?

Mr. STONEMAN.—We stipulate, if your Honor pleases, that the testimony of Mrs. Root—I was about to say that we would agree that the examination of Mrs. Root shall be confined to the question of only of the conversations alleged to have been held with her and the ownership of this stock.

The COURT.—I will permit them to take the interrogatories to confirm or deny the conversations to which the witness testified here, but I cannot permit them to take the deposition with reference to the ownership of that stock.

Testimony of R. T. Root (Recalled).

R. T. ROOT, recalled and testified.

On July 24, 1913, at Denver, Mr. Lowry had no conversation with Mrs. Root at which Mr. Mackay was present, to my knowledge. I was with Mrs. Root all the time on that occasion. [102] In the month of May, 1914, I had no conversation with Mr. Lowry in New York, about the execution of either of the mortgages in evidence in this litigation. In September, 1914, at Chicago, I did not have a conversation with Mr. Lowry with reference to any of the matters out of which this litigation arose. I did not have any conversation at that time with Mr. Lowry with reference to either the first or

(Testimony of R. T. Root.)

second mortgage. I did not have any conversation at that time with Mr. Lowry with reference to any purported stockholders or directors' meeting held in July, 1913. I did not have any conversation with him with reference to anything that was to be done in the future concerning any transactions between myself and Mr. Mackay.

I had a conversation with him at New York in 1914. I did have a conversation with him in September, in Chicago.

The COURT.—This case is closed except for the purpose of taking the testimony or the deposition of Miss Saunders or the stenographer whom Mr. Lowry testified did the typewriting, and the testimony of Mr. W. W. Root and the testimony of Mrs. Root, and the testimony of any other witness who was present at the alleged meeting in July, 1913. If there are any other witnesses that either party desires, whose deposition or testimony either of the parties desires, or who can give material testimony in this case, the party may make application to the Court for the purpose of enabling the Court to determine whether such further evidence may be taken.

The deposition of Mrs. Root is to be confined to testimony on her part in rebuttal to the testimony of the plaintiff as to conversations had with her about what she had said, testimony of Dr. Grier-mann, and Mr. Lowry. The testimony of some other persons who may have been there in the offices of Mr. Lowry and who may know something of it, I do not permit. I said any other person who was

(Testimony of R. T. Root.)

present at the meeting and that of Miss [103] Saunders. I did not understand that you ask permission to take the testimony of the office force or any other persons. I think the only thing that would interest me in that line would be the testimony of the stenographer. A general idea that some sort of minutes were written up without knowing what they were and the contents, would not go very far in enabling me to determine the issues in this case. The case may be transferred to Phoenix for further proceedings, and if testimony has all been taken and the parties will be ready, it will be heard on the 18th day of October. [104]

Testimony of Jessie Saunders.

Direct Examination of JESSIE SAUNDERS by
Plaintiff.

My name is Jessie Saunders and I live in Denver, Colorado, have lived there about four years and am acquainted with Mr. F. W. Lowrie. I know Mr. Root and his son Mr. Walter Root, and know a gentleman by the name of Mr. Sykes, Mr. Elmer Sykes.

In July 1913, I was engaged as stenographer for the Carlsbad Plantation and Orchard Company and the Interstate Land and Development Company in the Colorado Building, I think the number was 416. These offices were also occupied by Mr. Lowrie and Mr. Elmer Sykes. In July, 1913, I saw Mr. R. T. Root and Mr. Walter Root and Mr. McKay in these offices. They were in there at different times in July. They had a meeting there one day in July and I saw Mr. Walter Root there and I saw Mr. Mc-

(Testimony of Jessie Saunders.)

Kay come in to attend the meeting and Mr. R. T. Root was in the next room when Mr. McKay walked in. I cannot remember the exact date in July. Mr. R. T. Root was in the next room. These companies had two rooms, Mr. McKay and Mr. Walter Root came in. Mr. Lowrie was in the office, I don't know which room he was in when they walked in, they went into the next room. Mr. Lowrie came in while they were there and handed me a paper of some kind and asked me to transcribe it. I transcribed it very quickly as he was in a hurry for it, I wrote it hurriedly and gave it to him, he met me on the way and took it.

Mr. Sykes desk was right back of mine and he was sitting there back of me. I don't remember seeing Mr. R. T. Root and Mr. Walter Root go out but I am sure they didn't stay very long after that, I think they walked right out of the place then. I have no distinct memory of what I copied or wrote, I cannot remember the wording of the paper at all. I cannot recollect the general subject. Mr. Lowrie didn't dictate it to me, he handed me a paper that he had written out himself for me to transcribe on the typewriter. I do not remember distinctly what it pertained to, I have an impression—not an impression, but I do remember indistinctly of writing a paper for Mr. [105] Lowrie, and of thinking at the time that the name of the company was a new one to me—that I didn't know the name, because I had written so many papers for other mining companies. It related to this meeting that had just been held, it did

(Testimony of Jessie Saunders.)

not relate to those other two companies, it related to this meeting whatever the meeting was. Mr. Root was interested in those other two companies.

Plaintiff's Exhibit "W" for identification, pages 150 and 151, seem familiar to me; I would swear that this is Mr. Lowrie's own writing and his own shorthand, and I remember writing on a book at some time, but it is so indistinct, this book is— I wrote it from a book or a sheet of paper, I don't know which, but he didn't dictate it to me. That writing on page 151 is in the handwriting of Mr. Lowrie. I made one carbon copy and it is marked up here, "one carbon copy."

Cross-examination by Mr. STONEMAN.

I never tried to read Mr. Lowrie's shorthand notes, I may be able to read a few words, but I never transcribe from his notes, I do not think he writes exactly the same system. I was in Mr. Lowrie's employ two years and five months before July 1913, from April 15, 1911, until October 1, 1913. My desk was in his suite of offices, I was working in Mr. Lowrie's office. Upon the occasion testified to Mr. Lowrie did not have to send out for me. I have been doing temporary work since October 1, 1913. I went around from office to office. I did all of Mr. Lowrie's work except once in a while he wrote a paper himself, but I was his stenographer, he didn't hire other stenographers. He did a great deal of dictating to me. A great deal of it was in the shape of dictating his instructions to me, he very often wrote out a paper in long hand and handed it to me to copy.

(Testimony of Jessie Saunders.)

Before Judge Baker showed me Plaintiff's Exhibit "W," directing my attention to page 141 of this exhibit, I testified that Mr. Lowrie handed me a paper, I meant that it was written on something, I [106] didn't mean that he handed me a sheet of paper, I meant that it was written out and that he handed it to me. I never saw this exhibit before that was handed me by Judge Baker, unless I wrote from it at the meeting, that is what I have been trying to recollect. I wouldn't know whether it was a sheet of paper or whether it was a book, I can't say, if I could remember I certainly would say. I remember the circumstances very distinctly of him coming out and handing this paper to me and telling me to transcribe it. I do not remember the date but it was between two or three months before I left there, I don't remember exactly. I wouldn't say it was the 19th, I wouldn't say what month it was. Well, I was not expected to remember those things and if it hadn't been for one little instance, I do not suppose that I would recollect it at all, but Mr. Lowrie was standing back of my desk and talking to Mr. Sykes, and I heard the conversation, and it was in regard to Mr. McKay letting Mr. Root have fifteen or sixteen thousand dollars on a mortgage, and it impressed me because it seemed a little strange.

I don't remember the name of the Norma Mining Company, I didn't make any attempt to remember, I wasn't expected to remember those things. Mr. Walter Root first called my attention to the fact that I may have been present at this conversation, and

(Testimony of Jessie Saunders.)

might have transcribed this record. He came up to my room at the Roseland Hotel one evening about seven or half past, and the first thing he asked me was if I remembered writing the minutes of the meeting of the Norma Mining Company, and I said, "yes, I am quite sure I did," and then I said, "Well, I have written so many papers for other companies that I do not recall their names." He mentioned these names, The Treasure (?) Reduction Company and the Clear Creek Company, and I said, "I remember those very distinctly, and since you mention them, I can say for sure about this other company," and that was about all he said. He mentioned no other names at all until I asked him. [107]

I know George S. Sanders, I met him once, he came up to the hotel two or three weeks ago, I don't remember the exact date, but it was in the evening about six o'clock. The first question he asked me was, "Did you tell anyone that you didn't write these papers"? and I said, "No, I never told anyone that." I said to Mr. Walter Root that I wasn't quite sure whether I put in typewriting any minutes of any proceedings of stockholders or directors of the Norma Mining Company, but it was asked me unexpectedly and I had no time to give it any thought, and I couldn't say at that time whether I had or not. Since that time I have talked with Mr. McKay, Mr. Sykes and Mr. Lowrie and my memory was refreshed by conversations with those gentlemen to a very great extent; I just merely recalled it myself. We talked about a paper containing the minutes of the pur-

(Testimony of Jessie Saunders.)

ported meeting of the board of directors of the Norma Mining Company, held on the 19th day of July, 1913, but I remembered it myself. The next day after this conversation with Mr. Root I had the talk about the matter with the gentlemen opposite. No, I didn't talk to any of them the next day, I was up to their office the next day, but I didn't talk it over, I don't think that Mr. Sykes was there, and I know that Mr. Lowrie wasn't. I began to wonder why Mr. Root had called the night before. He gave me the impression that he just came up to find out where—if I knew where the papers were. Mr. Lowrie did come up to my place, to my room at the Roseland Hotel one evening, I think it was about that same week. He asked me if I remembered that I had copied a paper. I told Mr. Lowrie just what I told you. That Mr. Root first asked me if I had copied the minutes of this Company, the Norma Mining Company, I think that is the exact name, I am not sure, and I said, "Yes, I am quite sure I did," and then in a minute or two, I said, "What were the names of these other companies you were interested in," and he named them, it seems to me that he named two. I said "Since you mention these, I am not quite so sure, and I won't say now that I did." [108]

I made an exact copy of what Mr. Lowrie handed me, and that was this that has been exhibited to me by Judge Baker—Plaintiff's Exhibit "W." At the time he handed this manuscript to me to copy he told me to get it out as quickly as I could and that they

(Testimony of Jessie Saunders.)

were waiting for it. He said he was in a hurry for it and to get it out as quickly as I could, that they were waiting. If he said anything else, it could not have been of much importance, and he went back into the other room, and when I took it out of the machine he came out for it. I wouldn't have made any changes if he hadn't asked me to do so. I am not sure he didn't ask me to do so, but I don't think he did, I don't remember anything about those things. I don't remember whether it was in the morning or the afternoon. I am absolutely positive that Walter Root was there and R. T. Root was there and McKay was there, and Lowrie was there. They were together in the room where they were holding the meeting. Mr. McKay came in last, I don't remember whether they shut the door. Previous to this time Mr. R. T. Root was in that office, once in a while but not as often as Mr. Walter Root. I don't remember whether they were in shortly after or not. I don't remember any other meeting that was held on another occasion than the occasion which I have testified to, at which were present R. T. Root, W. R. Root, Hugh McKay and Lowrie. I was there during the ordinary business hours. There is no reason why I should remember if another meeting had been held, I remember this one because of the fact of Mr. Lowrie standing right beside my desk, and mentioning the matter to Mr. Sykes why the meeting was being held, and I looked up about that time and saw Mr. McKay coming in. I remembered this circumstance long before I had the conversation with Mr.

(Testimony of Jessie Saunders.)

Sanders. I told Mr. Lowrie about it, I told him when he was at the Roseland Hotel. I saw Mr. Lowrie at his office several times. I often go up there whether I have any business up there or not. I have told him at different times, it may have been either at his office or when he called, I told him both times very likely. I am not able to swear positively. [109] Mr. Lowrie called upon me at my residence, once, I think. I am referring to that one time. Mr. Lowrie knew where I lived at that time. I don't think Mr. Lowrie asked me to come to his office to have a further talk with him. I am not quite sure that he didn't. I went up there involuntarily. I didn't remember any instructions, but there are instructions written on the paper and naturally I would make a carbon copy. They had not been in Mr. Lowrie's office holding this meeting to which I have testified very long before Mr. Lowrie gave me that to copy. I don't know whether it was in the morning or in the afternoon. I do not know the date. I do not know whether it was on a separate sheet of paper or that book, but it was written out in long-hand for me to transcribe, I remember that distinctly. I am quite sure he did not give me any other paper with that to copy. He gave me what he had written at that time, it was written in long hand, certainly and it may also have been written in short-hand, but the longhand is what I wrote from. I do not recall whether there was any shorthand notes given to me with the longhand copy.

I have said that I have an indistinct recollection

(Testimony of Jessie Saunders.)

of him handing me a book at some time, and having me transcribe a paper from it, but I can't remember what the book was like. I do not recall what date I filled in there in that meeting where it was blank.

I was employed on a salary at that time by the Carlsbad Plantation and Orchard Company and the Interstate Land and Development Company. I made no note or charge for this extra work, it was part of my regular work. I think Mr. Lowrie was an officer in one of these companies that I speak of. I did all the work in his office that he asked me to do without any extra compensation. I considered it part of my work; I didn't make any distinction in the work that Mr. Lowrie gave me, it was all the same to me. I was not called upon to read any shorthand notes.

It was not customary for Mr. Lowrie to writ all of his work [110] that I did for him out in long-hand, and then have me copy it for him on the typewriter. This was not the only exception that I know of where he did that. I have never been told this meeting was on the 19th, July 19th, 1915, it wasn't part of my testimony I wasn't paying any attention to anybody else's testimony. I have mentioned what I remember. I have been questioned and my recollection refreshed by those who are interested in what I knew. No suggestions have been made to me as to how my testimony should be presented. I have told everybody I would tell the truth. Mr. Lowrie called at my residence for the purpose of having this conversation with me in the evening. He did not call upon me by appointment, he just went up

(Testimony of Jessie Saunders.)

taking chances of my being home that evening. He didn't telephone me he was coming. Mr. Lowrie didn't send out for me to do this work, I was right there. I do not know whether the minute-books of the company were there or not.

Redirect Examination by Mr. BAKER.

I was Mr. Walter Root that came to see me in Denver and asked me these questions, I think it was about seven or half-past seven in the evening, I do not recall the exact date he came to see me and asked me these questions. I know him to be the son of Mr. R. T. Root. He didn't say where Lowrie was and did not say anything about his father. I don't think Mr. Walter Root said anything in reference to him having been requested to see me or sent to see me about that matter.

I think this man Sanders is a policeman or a detective of the police force of Denver, I am not sure whether he was a regular policeman of the City of Denver. He is an ordinary policeman of the street; I do not know what position he holds. I do not know whether he was in private employment or public employment. He called upon me about three weeks ago, although it may not have been quite that long. I had often seen his name mentioned [111] in the papers, and then he told me he was a detective. He said that Judge Whitford had sent him up. He is sitting right across the table in the courtroom. He said he was sent up to see me by Judge Whitford the representative of this other party—I do not remember the exact words.

(Testimony of Jessie Saunders.)

Recross-examination by Mr. STONEMAN.

Mr. Sanders told me who he was and what he came up for. I told Mr. Sanders that I told Mr. Root, after he mentioned those other mining companies that I wasn't quite so sure, and I couldn't say at that time. I didn't tell him that I denied writing that, and I told Mr. Sanders that I had never told anyone that I didn't write those papers. That was the first question he asked me and I said I never told anybody that I did not write those papers. I have heard it mentioned before I came to Arizona that these minutes which I was given to copy were in a book. I did not know that they were in a book. I know that I have written some papers from a book.

By the COURT.—I wish you would repeat as nearly as you can the exact conversation which you say you heard between Mr. Sykes and Mr. Lowrie. I could not possibly repeat the exact words, I really was not paying any attention. I overheard their conversation and it impressed me because it seemed strange; the impression is that fifteen or sixteen thousand dollars was mentioned, by Mr. Lowrie to Mr. Sykes, and I construed that there was to be a meeting—I can't remember the exact words at all. Of course they were meeting there, and I looked up when they came in when I knew there was going to be a meeting there for that purpose. I cannot remember any of the conversation. I didn't make any attempt to remember it. I remember something about what took place. It was Mr. Lowrie who mentioned the sixteen thousand dollar mortgage. I do

(Testimony of Elmer Sykes.)

not remember what he said. I remember that they were to have a meeting; that was the most important [112] thing, the meeting and the amount. I remember those things but not the exact words they said. All that I remember is that there was to be a meeting and a fifteen or sixteen thousand dollar mortgage, I do not remember the amount. Mr. McKay was to let Mr. Root have the money—I didn't pay any attention to the details. I do not remember the month this conversation was had, I know it was not very long before I left there at least.

Testimony of Elmer Sykes.

ELMER SYKES was called as a witness.

Direct Examination by Mr. BAKER.

My name is Elmer Sykes, I reside in Denver, Colorado, I am in the real estate business, am fifty-four years old, and have known Mr. Walter Root between four and five years. I have know Mr. R. T. Root about thirty years, possibly longer, about twenty-five or thirty years. I know Mr. F. W. Lowrie, have known him probably about forty years. I have known Mr. McKay, the plaintiff in this action, about four or five years, since I came to Denver. In July 1913, I was in business in the Colorado Building, Denver, Colorado. I was with Mr. Lowrie as secretary of the Carlsbad Plantation and Orchard Company and the Interstate Land and Development Company. At that time I occupied the same office with him. At that time I knew of the defendant in this case, the Norma Mining Company.

(Testimony of Elmer Sykes.)

In July, 1913, I will ask you if you saw Mr. Walter Root, Mr. R. T. Root and Mr. Hugh McKay in that building in the office occupied by you and Mr. Lowrie?

By Mr. STONEMAN.—We object to the question, if your Honor please, for the reason until the date is fixed the question will be immaterial.

By the COURT.—The objection is overruled.

By Mr. STONEMAN.—Exception.

Yes, sir.

Mr. F. W. Lowrie was there at the time Mr. McKay and Mr. Root came in on Saturday. Mr. Root and Mr. Lowrie were intending to [113] go fishing on that Saturday. I remember it because it was his custom quite frequently to go fishing on Saturday and Sunday. That would be the 19th day of July. He said he would not be able to get away to go on the morning train because Mr. McKay—Mr. Root had brought Mr. McKay to him for him to prepare some papers necessary for the preparation of a mortgage. I know the facts of Mr. McKay having the loan. On Saturday Mr. Lowrie took the afternoon train for Deckers which is a fishing resort and came back Monday some time. After that I saw Mr. Walter Root, Mr. R. T. Root and Mr. McKay and Mr. Lowrie there in that office. That was Tuesday, it must have been Tuesday, that is my recollection of it when they had this meeting, Tuesday the 22d. I know that Mr. McKay went away on Thursday the 24th. In the office on that occasion was Mr. R. T. Root, Mr. McKay, Mr. Lowrie, myself and Miss

(Testimony of Elmer Sykes.)

Saunders. Miss Saunders was in the same room with me. They stepped inside the other room, there were two rooms and they went into the other room through the one Miss Saunders and I were occupying. I knew they came there for the purpose of having a meeting. They were holding a meeting and Mr. Lowrie came out and handed Miss Saunders a paper to transcribe and she wrote it, and Mr. Lowrie took the original into the other room and I read the carbon copy. She did make a copy of that paper and I read it which was the custom.

Mr. BAKER.—I show you Plaintiff's Exhibit "W" for identification. I refer you to pages 151 and 150 there.

Mr. LOWRIE.—This is very familiar. This is Mr. Lowrie's hand writing. I don't know anything about this part over here. I cannot say positively whether or not that book was handed to Miss Saunders by Mr. Lowrie upon that occasion to copy from, yet I feel very sure of it.

I will ask you to read the entries there on that page Mr. Sykes. (Witness reads minutes referred to.)

Mr. LOWRIE.—Yes, sir, that is just as I knew at the time. [114] Our desks were practically together and it was always the custom, and is still that when a paper is written in the office, that I read it—read over the original or the carbon copy before filing. Of course there was no filing in this case, but that has been the custom right from the time that I came in the office. I supervised the work by the stenographer. Of course it was so understood when

(Testimony of Elmer Sykes.)

we came together, Mr. Lowrie was away from town a good deal of the time and he said he wanted me to keep track of everything. I have known Mr. Lowrie for forty years; I guess he does not remember the time that he did not know me. Miss Saunders wrote it out and Mr. Lowrie was there waiting for it, and she took the original and went into the room, and I in the meantime read the carbon copy of this purported instrument. I handed the copy to Mr. Lowrie later, it did not refer to anything in the office and I do not remember what became of it after that. Mr. Walter Root immediately left. Mr. Root did not go through the room; he went out through a side door in the hall and Mr. McKay remained and talked awhile. He subsequently left too, and I remember saying to him that I was very glad that Mr. Root had fixed this matter up for him.

This entry in Plaintiff's Exhibit "W" as shown me and which I have read is the same as the carbon copy of the instrument made by Miss Saunders, it is practically the same as I remember, of course I could not give it word for word, the substance is the same.

Cross-examination by Mr. STONEMAN.

I am familiar with this litigation in a general way. August 26, 1915, Mr. Lowrie was at Prescott in this State.

Mr. STONEMAN.—I will admit that.

Mr. BAKER.—That Mr. Root was there also on August 26th?

By Mr. STONEMAN.—Yes.

I really cannot tell when the litigation was first

(Testimony of Elmer Sykes.)

called to my notice, I knew that they were having trouble. Of course I knew [115] about this meeting and the mortgage and I knew of its preparation and I did not suppose there would be any trouble at all about it, but I do not know when it was first called to my attention; at the time that Mr. Lowrie and Mr. McKay first went away, I suppose. That had been hanging fire for some time, that trial. It must be a year, isn't it, since it first began. I am not at all interested in this litigation. I knew about the litigation before it commenced. Mr. Lowrie told me that he was to Prescott with Mr. McKay—I knew nothing about it. I did not talk the case over with him, I am sure of that. I did not know that he took this purported Minute Book along with him, I did not know anything about that; he never has talked about that.

The transcribing of the notes was made by Miss Saunders, I think, on the 22d of July, 1913, on Tuesday. It could not have been before that, because Mr. Lowrie was out of the city. I am sure it was not on July 19th, 1913. No, Mr. McKay and Mr. Root came in together at that time. I have not read the records in this case, not the whole of it; I read part of it on the train coming down, I had never seen it before and I was naturally interested in it a little. I read Mr. Root's testimony, glancing through a portion of Mr. Lowrie's I glanced through enough to get the substance of it, read enough to know what he testified to. I did not read Mr. McKay's testimony. I didn't look at that. I was not interested in the company

(Testimony of Elmer Sykes.)

in any way. This purported meeting was held in my office, the doors were open. No, sir, I didn't listen to it all. Mr. Lowrie told me what the purpose of it was, he told me Saturday that they were going to have a meeting later; that Mr. Root had brought Mr. McKay to him and Mr. Lowrie told me that Mr. Root told him to prepare the papers necessary to have this mortgage issued, and Mr. Lowrie said that he told Mr. Root that he proposed to draw it in the right form, and he proposed to have a meeting of the directors and stockholders, that they were coming in, and that they were going to have a meeting when [116] he returned from Deckers. And then they came in Tuesday right after lunch, I think, and had the meeting. During the conversation Miss Saunders was not present, I imagine she had gone home, she did not hear that then. That was on Saturday that he told me that; they had their meeting on Tuesday, if I am not mistaken, either Tuesday or Wednesday.

Mr. Lowrie just stated that I knew the circumstances of Mr. McKay having loaned these trust funds just for accommodation for a short time; that he was going to put it back and could not do it, and that he wanted some security, the heirs were pressing him, and Mr. Root agreed to have this mortgage executed against the property, and of course, that was the purpose of this meeting.

I talked to Mr. McKay and I knew the circumstances with reference to the loan but I did not know the details, of course I knew about the loan from Mr.

(Testimony of Elmer Sykes.)

McKay and Mr. Lowrie also. Mr. Lowrie and I had not preliminarily discussed the purpose of the meeting, he told me they were going to have a meeting. That is the only conversation that I and Mr. Lowrie ever had about this meeting. He told me they were going to have a meeting Tuesday on his return, and I knew when he came in what the purpose of the meeting was for, for he had spoken to me about it. I think that he told me again and said that they had made their plans to have a meeting. Two meetings are all that I recollect, the first one on Saturday, the next one must have been on Tuesday. Miss Saunders was not in the room both times, the first time was on Saturday, Mr. Lowrie was waiting for these others to come in, and while he was waiting he spoke to me about it. When I had this conversation with Mr. Lowrie about what this transaction was at that meeting and at which I said Miss Saunders was present, these gentlemen went into the other room and held a meeting and after this meeting was held Mr. Lowrie came out and gave Miss Saunders a paper to copy. I have not testified to-day that they did not hold a meeting until three days afterwards. I don't know when I [117] first saw that book referring to Plaintiff's Exhibit "W." At the time she prepared the papers, the minutes, my recollection is that he brought that out from the other room and asked Miss Saunders to transcribe that at once. That would be the same day (before the meeting) that I had the conversation with Lowrie regarding

(Testimony of Elmer Sykes.)

what was to be done at the meeting which Miss Saunders was present.

Mr. Root brought Mr. McKay in on Saturday and they did not have a meeting at that time but Mr. Root told Mr. McKay what to do and Mr. Lowrie went away on a fishing trip, and when he came back then they had the meeting. I talked with Mr. Lowrie about what was to be done while we were waiting for them to come in in the morning on Tuesday. I was not asked to come out as a witness on the trial of the case last August. I did not tell Mr. Lowrie what I would testify to as a witness. Prior to last August, 1915, I did not have a conversation with Mr. Lowrie as to the conduct of the trial of this suit. He did not tell me that he was going to have to prove that a meeting of the stockholders was held sometime in July, not that I recall. I volunteered to testify in this case. I knew the facts and I thought it was my duty; I told Mr. McKay so. I had no talk with Miss Saunders about what I was going to testify to. In a general way we talked about it, and I really never went into details about it until since we came over here. I came to Phoenix with Mr. McKay, Mr. Robinson and Miss Saunders. The only thing that was mentioned about the case was that I noticed Mr. Robinson looking through his papers, and I asked him at dinner, I think it was one day he was looking through some memorandum and I asked him "Are you refreshing your knowledge" and he said, "Yes, I am," and I said, "I would like to know what it is," and he said, "I will see that you have a chance to."

(Testimony of Elmer Sykes.)

And just the day before yesterday he handed me a paper and said "You can look at this if you wish" which I did. I only looked then at Mr. Lowrie's testimony and I said to him that I know the facts. This book is exactly as I knew it in July, 1913, the substance is the [118] same as far as I can remember. I cannot remember every word of the paper. The date of that meeting was not filled in as I know of. I read the carbon. It read the blank day of July, that is my recollection. I didn't think that I testified that I was sure that date of July was left blank in that carbon copy. I do not think that I did; possibly I did. I did not know the details. I did not listen. I knew the purpose of the meeting, then this paper was prepared and I read the carbon copy and I saw them retire. I was not interested but it was always the rule and it is still the rule that any paper prepared in the office I scrutinize it. I didn't file it, I handed it back to Mr. Lowrie. I did not know what Mr. Lowrie did with it, he never told me. During the time that Miss Saunders was writing the copy which she testifies was handed to her by Mr. Lowrie, Mr. Lowrie was in the other room and he got impatient and came out and stood there with us, or rather stood beside her waiting for it.

By Mr. STONEMAN.—You said in answer to a question asked you by Judge Baker that that book referring to Plaintiff's Exhibit "W," was very familiar.

By *LOWRIE*.—But I can't say certainly it was handed to Miss Saunders. She was writing and I

(Testimony of Elmer Sykes.)

am pretty sure she was transcribing from this, yet as I said before I would not swear to it, and yet the book is familiar and I know his handwriting. I must have seen it before or it would not have been familiar to me. The book is familiar and of course the handwriting I know as well as I know my own. The book has not been knocking around the office, I think it is familiar because I probably saw it at that time. This is the extent of my familiarity with it. I just saw it once and yet it is very familiar to me. I didn't know what Miss Saunders had written until I read the carbon copy. Miss Saunders did not hand the copy to Mr. Lowrie, I rather think that I took it. I don't know why I should be interested in that, I was only interested in knowing what she was writing, as the custom was always the same, to see that there [119] was no errors. In this case I read it as a matter of form, as our custom was. Then I dismissed it from my mind. I turned it over to Mr. Lowrie. I do not remember any definite conversation about it subsequent to August of 1915. In a way I was interested but only to the extent that I knew the circumstances, and I was glad that Mr. Root was making it possible for Mr. McKay to have this security. I was not supervising this matter, I was merely watching it. I was glad to know they were fixing the matter up. My interest didn't cease then. I do not know where Lowrie got that book. It is familiar, I have seen it; or rather that I have seen a book like that, and I know his handwriting. I do not think there was another book in the office

(Testimony of Elmer Sykes.)

just like that, there was one similar, but not just like that. I do not know what the book had been used for before it was used by Mr. Lowrie to make that notation in. It is the only book of its size that I recall. I do not know what was in here between pages 30 and 79, it is not one of the books I know about but I am familiar with it, I mean to say that I am not familiar with it in that I have made entries in it. It is familiar as to size and the *buildings* and the book itself. I think Mr. Lowrie kept that on his desk, on his private desk. I do not know anything about where he kept it but I have seen it on his desk a number of times, and that is why I am familiar with it. I don't recall that I saw him make any entries in there. I do not know what was contained in this book which appears to have been cut out of it which was on pages from 1 to 16 inclusive. For all I know that book might have belonged to Mr. Root or someone else, but Mr. Lowrie had Mr. Root's papers in there and I saw them on his desk. I just noticed that he had papers there with reference to the Clear Creek Power Company. I had conversations with Miss Saunders about this case, several times lately, two or three times since last August, what she remembered about it, and then she told me about Walter Root coming to see her, and also told her about this detective Saunders telling ——, [120] to attack the validity of this meeting or alleged meeting and the proceedings there had, and the defendant must have known that if Mrs. Root was not present there as a stockholder, and that would have been

(Testimony of Elmer Sykes.)

very material evidence, and they could have proved that by having her deposition taken.

By Mr. STONEMAN.—I make an exception to the striking out of these interrogatories. We rest.
[121]

The first conversation I had with Miss Saunders as far as I can recall now was when she told about Walter Root coming to see her. That was when Mr. Lowrie was away, it must have been in the latter part of August.

Mr. Lowrie asked me what I remembered about this case. I think it was after I talked with Miss Saunders. Mr. Lowrie told me a little about the testimony and I said, "Well, I remember those facts." I said that I remembered so and so, and that was all. I never saw the minutes on page 151 of Plaintiff's Exhibit "W," nothing more than if I did see it I saw it at the time that she transcribed it. I have not said or intended to say that she did transcribe from that, although I think she did, and of course my knowledge comes from the carbon copy which I read. The substance of that was just as I remember it from reading the carbon copy. If I had seen it before, it was at the time she transcribed it, which I think she did. In referring to the entry on page 151 of exhibit "W" when I said I knew it at the time—I was referring to this entry made in Mr. Lowrie's handwriting. What I intended to convey that the substance of those minutes were just as I remember it from the carbon copy. I saw what she was transcribing, if I saw the book at that time.

(Testimony of Elmer Sykes.)

By the COURT.—I think you said a while ago that you did not read anything in the book if that is the book that you saw.

Mr. LOWRIE.—Well, I meant by that—well, the desks are right close and she was at the typewriter transcribing that paper, and I meant that the contents of that, the minutes there were practically the same as I remember them from the carbon copy which was prepared. I have no distinct recollection of whether it was book or a paper. I saw the writing, yes, whether it was a book or a paper. I have not seen the carbon copy which I say I handed to Mr. Lowrie since the time I handed it to him, nor the original, nor this book. I have had no opportunity since July, 1913, to refresh myself as to the contents of this record of a meeting. Mr. Robinson gave [122] me a copy and asked me if I recalled it, and I told him I knew the circumstances of the meeting, and he asked me if I remembered it. I had to look at everything Miss Saunders did at that time. She was not doing public work in my office at that time, she was working for our corporations and was not working for Mr. Lowrie individually, nor was she working for me individually. When I went into the office Mr. Lowrie asked me to look over every paper and everything before filing it and after it came from the machine. He was busy a good deal of the time on outside matters, and I would look over things, and if there was anything in the letters, or any thing that I thought wrong, I would call his attention to it. I saw all the copies of Mr. Lowrie's

(Testimony of Elmer Sykes.)

correspondence. It was my agreement with Mr. Lowrie to read everything that came from the stenographer. This copy that Miss Saunders made had no concern with any business with which I was directly interested, and therefore I didn't file it, because that was understood as I told you before; to see if there were any typographical errors. That was part of duty, to correct the copy of Miss Saunders, and he told me he wanted me to keep track of everything in the office, so that in his absence or death I would know the full circumstances. I did not compare this work.

I had no conversation with Miss Saunders as to What Mr. Lowrie's instructions were with regard to that piece of work. I knew beforehand what the meeting was for. Mr. Lowrie told me, he told me on Saturday that there was going to be a meeting for that purpose and they had it Tuesday. He didn't go into details any more than to say what the meeting was for and I know.

I glanced over Mr. Lowrie's testimony. I didn't read it carefully. The only information I have of what Mr. Lowrie testified to is the information I gained from glancing over the transcript. Mr. Lowrie never told me what he testified to, and nobody else ever told me what Mr. Lowrie testified to. Neither his counsel nor Mr. [123] McKay. I read this on the train and that is the only time.

I said that upon Mr. Lowrie's return in August from Prescott he told me that the case hinged upon the matter of the meeting, and I said, "I remember

(Testimony of Elmer Sykes.)

about that—I remember the whole thing,” and so we never have gone into the details of it. Mr. Lowrie didn’t tell me at that time that the record of what he testified to was contained in this book marked Plaintiff’s Exhibit “W,” I don’t recall that he did. As I said, we did not go into details. I have no recollection about this book.

Redirect Examination by Mr. BAKER.

Mr. SYKES.—In any conversation that I might have had with Mr. Lowrie, or Miss Saunders, or anyone else concerning this case or any facts that is connected with this case, or anything about this meeting that I have testified to on July 1913, no one has suggested to me or prompted me in any way as to any facts that I should remember to testify to. I was one of the directors of one of these companies which were conducting business in the office occupied by me and Mr. Lowrie. The Clear Creek Power Company in the year 1913.

Testimony of Walter W. Root.

WALTER W. ROOT, was called.

Direct Examination by Mr. STONEMAN.

My name is Walter W. Root, I am a son of R. T. Root and a brother of Herbert Root. I reside in Denver, Colorado, and have resided there for more than twenty years. I was a continuous resident of the city of Denver during the years 1912, '13, '14 and '15, with the exception that I have been out of town part of the time at times.

I knew a young lady named Miss Jessie Saunders,

(Testimony of Walter W. Root.)

I saw Miss Saunders in Denver on the 26th day of August, 1915, at her hotel, at the Roseland, in the evening. I had a telegram from my father asking me to see her and ask her a certain question. I asked her upon entering the room if she had transcribed the minutes of the reputed minutes of the Norma Mining Company—those are not the exact [124] words, but they are nearly the words. I tried to say the words—to state the words in the telegram used by my father, whether she had transcribed by typewriter the reputed meeting, and she replied that she didn't even know the name of the Norma Mining Company. And I asked her if she knew the Treasurer Mining Company, and she said, "Yes," and I said, "You know the Glendale Company, the Glendale Mining Company," and she said, "Yes," "and the Clear Creek Power Company" and she said, "Yes." I said, "You have written a good many papers of those companies, because those companies I had organized during the year 1913."

I said, "You have written me certain papers," and I said, "And you have written minutes about the Treasure Power Company," and she said, "No, Sir," and I said, "Minutes of the Clear Creek Power Company," and she said, "Yes, sir," and I said, "And the Norma Mining Company," and she said, "No, I do not know that name," and we had about a four-minute conversation and it was all about like that. I just kept asking her one question after another, I asked her if she had written any annual reports, that was one of the questions that I asked

(Testimony of Walter W. Root.)

her, and I asked her how many hours work she had done for these different companies, and she said about a hundred, for the two new companies.

The COURT.—*By* you are positive that she said that she did not even remember the names, [the name of the Norma Mining Company, are you positive of that?

WALTER W. ROOT.—I am very positive because I asked her that question; I would always come back to that question and she said, “I do not even know the name of that company.”

I knew her in a very friendly way. I know the detective Sanders of Denver; I thought it was George F. Sanders, but I may be in error, but the big man Sanders in Denver, the detective, I know him. [125]

I had instructions from father to employ Mr. Sanders there, through Judge Whitford. I did employ Mr. Sanders. He is acting desk sergeant in Denver of the detectives, he is the assistant chief of detectives in Denver. He is not right here; he was to have been here this morning. There is a flood near Ashfork, and his train is held up.

I know F. W. Lowrie of Denver very well. In the month of July, 1913, the offices of Mr. Lowrie were in Denver in the Colorado Building in Denver. The offices of the Norma Mining Company at that time were in the Cooper Building, in my father's office. I was an officer of the Norma Mining Company in July, 1913. In the month of July, 1913, I was a stockholder of the Norma Mining Company.

(Testimony of Walter W. Root.)

I was not present as a stockholder or director of the Norma Mining Company at any meeting of stockholders or the board of directors of that company held in the office of Mr. Lowrie of Denver on the 19th day of July, or on the 22d or the 23d day of July, 1913.

(Witness reads Plaintiff's Exhibit "W"—Entry page 151.)

That page, in so far as it purports to show that I was present as a director of the Norma Mining Company at a meeting of its board of directors in the month of July, 1913, does not speak the truth. I was not present at any meeting of directors or stockholders of the Norma Mining Company at any date during the month of July, 1913. The minute-books of the Norma Mining Company were kept during the months of July, August and September, 1913, in a closet in my father's house, in his bedroom. They were kept in the office of Mr. Root but moved them from the office to the house there in the last part of 1912 or the early part of 1913. I took the books home in the early part of 1912 or the latter part of 1911 because we were moving our offices—

By Mr. STONEMAN.—Now, then, if your Honor pleases, at this time we move that the testimony of the witness, Elmer Sykes, be stricken from the record as not properly admitted under the limitation placed [126] upon the testimony made by the order of the Court at Prescott in August.

By the COURT.—The motion is denied.

By Mr. STONEMAN.—Excepted.

(Testimony of Walter W. Root.)

Cross-examination.

By Mr. BAKER.—Mr. Walter Root, are you the person or party who signed one of these mortgages in suit as the secretary of the Norma Mining Company?

By Mr. STONEMAN.—Object to the question as not coming within the limitations placed upon the testimony of witnesses to be taken at this time.

By the COURT.—I change my ruling. I overrule the objection and allow you to show if you can that this witness signed the mortgage in question.

(Plaintiff's Exhibit "E.")

By Mr. ROOT.—Yes that is my signature.

The telegram from my father might have been dated Prescott or Ashfork, but I had a telegram from him on the 26th, and I have forgotten which place it was from, either Prescott or Ashfork. My understanding was that he was leaving Prescott, had either left Prescott or was leaving when he sent the telegram. I think the original is in Denver. I have not got it here. I didn't bring it because I knew that Mr. Stoneman would have copies in some way or another, and in pursuance to that telegram I went to see Miss Saunders. I employed this detective Sanders under the instructions of my father. I was acting on instructions from father when I went to see Miss Saunders. I had a telegram instructing me to do a certain thing, and I did it. It was just to find out one thing, whether she wrote those meetings or not. I do not know what you are laying for, but I know what I went there for was

(Testimony of Walter W. Root.)

to get father's question answered. At that time I had no information at all, and had no idea of being a witness. My intention was to get the information for father. I [127] hadn't the remotest idea of anything excepting to get the information for my father. It hadn't even crossed my mind to be a witness. I read her this question that father had telegraphed me to ask her: "Did you transcribe by typewriter the minutes of this reputed meeting of the Norma Mining Company on July 19th, 1913"? She said she didn't even know the name of the company. I wanted to find out what she did know. I asked her about all those other things. My first question did not give me all I wanted to know. It is not ordinary for me to interrogate witnesses. The telegram from my father did not tell me to ask her any question about any other company. It would be the ordinary thing to do in a case of that kind. I was not present at a meeting of the directors of the Norma Mining Company in an office occupied by Mr. Sykes and Mr. Lowrie in the Colorado Building in Denver, in July, 1913. I wouldn't state that I was not in that building at all in the month of July, 1913, in the office in that building occupied by Lowrie and Sykes. I will state I didn't attend any stockholder's meeting in the month of July. I haven't the remotest idea whether I was in that building during the month of July, 1913, or not.

Redirect Examination by Mr. STONEMAN.

I was not in Mr. Lowrie's office on business connected with the Norma Mining Company in any

(Testimony of Walter W. Root.)

shape, form or manner during the month of July, 1913.

By the COURT.—Give me that other mortgage, Mr. Clark, please. I find here Mr. Root, a mortgage which has been shown to you dated the 31st day of March, 1914, signed by the Norma Mining Company by R. T. Root, President, and attested by W. W. Root, as secretary in which the following statement appears: “The execution of this mortgage was duly authorized by a meeting of the stockholders of the said mining company at which meeting all the shares issued and outstanding were present or represented, and voted in favor of a resolution authorizing [128] the execution and delivery hereof and was also authorized by resolution of its board of directors by a unanimous vote at a meeting at which all the directors were present.” Did you read that when you signed it?

A. I expect I did; I haven't read it to-day.

Q. Did you read it at the time that you put your name and the seal of the company upon it?

A. I think I did that in New York.

Q. Well, why did you execute this mortgage as secretary of the company with that recital in it if it wasn't true?

A. Well, Mr. McKay was in New York with us and we were making arrangements to go on to New Mexico on account of sole sales of property, and this paper was given to me in New York. Well, he left New York and I left a day or so following and he was to pay certain monies, which he never did

(Deposition of Mrs. Root.)

do; he did pay some of the monies but not in—

Then is this statement here true or not—

A. We had our corporation work usually in the hands of and under the advice of an attorney, and lots of papers are signed before they are ever considered or looked at whatsoever. We have papers now that are the same as that paper there—I don't mean that identical paper, but I mean other papers of other business.

Q. Then no meeting was ever held as recited in here?

A. There was no meeting held for the last two or three years.

Q. No. corporate action taken at all?

A. No, sir, that property was an idle property.

Q. It makes no difference whether it was idle or active. Let me see that other mortgage, please. You didn't execute the first mortgage, did you?

A. I did not.

By the COURT.—That is all.

Deposition of Mrs. Root.

Deposition of Mrs. ROOT. [129]

The WITNESS.—Mrs. A. S. Root, testifies as follows: I am the wife of Mr. R. T. Root. I did not have any conversation with S. W. Lowrie at the railroad station in Denver as I and my husband were leaving for Los Angeles on or about June 24, 1913. I did not state on that occasion to Mr. Lowrie in substance that I knew the purpose of the visit to California was to negotiate the sale of a \$16,000 mortgage on the Norma Mining Company's prop-

(Deposition of Mrs. Root.)

erty, and that I hoped it would be successful. I did not tell Mr. Lowrie on that occasion or on any other occasion that my husband and myself were going to California to get money to pay off the checks held by McKay and expected to get it by mortgage of the Norma properties which had been authorized and hoped to sell for \$25,000 or words to that effect.

The 5th interrogatory was then read which is as follows:

Q. State whether you ever had any knowledge or information of the execution of either or any mortgage of the Norma Mining Company property.

A. No, I did not.

Mr. BAKER.—We object to interrogatory 5, as not within the rule, for the admission of testimony at this time.

The COURT.—Now, counsel for the plaintiff, as shown on page ten of this transcript, said: “That it may be clear, I would like to suggest to your Honor that the statement of Mrs. Root, be confined on her part to rebuttal to plaintiff’s testimony as to conversations had with her about what she had said, the testimony of Dr. Coleman and Mr. Lowry.” That seems to be mixed up and confused. I do not think that the reporter got all that was said at that time.

By Mr. BAKER.—You will find a further statement made by the Court there that the testimony should be confined to the meeting, and to the conversation that was testified to that Mrs. [130] Root had had there with Dr. Coleman or Mr. Lowrie.

(Deposition of Mrs. Root.)

The COURT.—Well, now, that does not call for conversation with either of the three persons mentioned in this ruling of the Court. It seems to me that that is a matter which should have been brought out at the other hearing. Under the ruling of the Court, I will have to sustain that objection because it was distinctly understood that such testimony should be confined to conversations with Mr. Lowrie and Dr. Coleman or either of them, and I permitted that because counsel stated, and I thought there was some force in the statement, that they were surprised at the testimony given. Now as to whether or not Mrs. Root was present at the meeting or had any knowledge of it, that they might have been anticipated, and they could have taken her deposition and introduced it at the original hearing, and failing to do so—

By Mr. STONEMAN.—If your Honor please, before you make a final ruling. There is another phase of the question; it touches upon the authenticity of that meeting. The testimony is that Mr. Root was there with the certificates of shares in his hand.

By the COURT.—Well, there is no one that ever has claimed that Mrs. Root was present.

By Mr. STONEMAN.—No, that is quite true. Upon the first statement, I agree with your Honor that it is not strictly within the rule because it does not touch the conversation, but it does effect the meeting.

(Deposition of Mrs. Root.)

By the COURT.—Pass that question. I reserve my ruling for the moment.

Interrogatory No. 6.

Please state what interest, if any, you had in the Norma Mining Company?

A. I have all the interest except three shares.

Q. 7. State whether you saw Mr. Geierman in Los Angeles on or about July 28, 1913.

A. Yes, sir, I did.

Q. 8. State whether on that occasion or at any other time in Los [131] Angeles you said to Dr. Geierman that Mr. Root owned a great deal of property which was not bringing in any money and that he was in need of money and if he would assist him to get a loan on the White Hills property Mr. Root would soon be able to pay him, Dr. Geierman, money that was past due. A. No, I did not.

Q. 9. Was there ever any such conversation between you and the Doctor? A. No.

Q. 10. State whether or not you saw Dr. Geierman in New York in June or July, 1914?

A. I did.

Q. 11. Did he on that occasion ask you if Mr. Root still owned the White Hills property?

A. No.

Q. 12. And did you answer the question, yes?

A. No.

Q. 13. Was the company indebted to your husband Mr. R. T. Root in any amount? A. No.

Mr. BAKER.—We object to the 13th interrog-

(Testimony of R. T. Root.)

atory, that it is not within the rule prescribed by the Court.

The COURT.—Read the next one.

Q. 14. Did you have any conversation with Hugh McKay about a mortgage of the Norma Mining Company or the White Hills property in Los Angeles in June, 1913, and if so, what was said?

A. No, I did not.

Q. 15. Did you say to him at the Alexandria Hotel or at any other time or place that you thought the mortgage should be made for \$25,000? A. No.

Q. 16. And did you in that connection give as a reason that you wanted Mr. Root to have what money he needed in his business or words to that effect? A. No.

The COURT.—I sustain objection to Interrogatory Nos. 5, 6 and 13, as not being within the rule.

I do that because of the fact that the pleadings in the case show that the defendant had determined [132] to attack the validity of this meeting or alleged meeting and the proceedings there had, and the defendant must have known that testimony showing Mrs. Root was not present there as a stockholder would have been very material evidence, and they could have proved that by having her deposition taken.

By Mr. STONEMAN.—I make an exception to the striking out of these interrogatories. We rest.

The foregoing Statement of the evidence herein, (pages 1 to 109 inclusive), approved October 30th, 1916.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the District Court of the United States, in and for the District of Arizona. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. E-6 Prescott, E-33 Phoenix. Statement of the Evidence. Filed Nov. 1, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [133]

*In the United States District Court for the District
of Arizona.*

No. 33.—(PHX.)

HUGH MACKAY,

Complainant,

vs.

NORMA MINING COMPANY,

Defendant.

The deposition of Mrs. A. F. Root, of the County of Cook and State of Illinois, a witness of lawful age, produced, sworn and examined under oath, on the 3d day of November, in the year of our Lord one thousand nine hundred and fifteen at the office of Richard H. Wyman, in the City of Chicago, in the County of Cook and State aforesaid, by me, Richard H. Wyman, a commissioner duly appointed by commission issued out of the clerk's office of the United

States District Court, for the District of Arizona, bearing teste in the name of George M. Lewis, Clerk of the said court, by R. E. L. Webb, Deputy, with the seal of said court affixed thereto and to me directed as such commissioner, for the examination of the said A. F. Root, a witness in a certain suit and matter in controversy now pending and undetermined in the said United States District Court for the District of Arizona, wherein Hugh Mackay is plaintiff and Norma Mining Company is defendant, in behalf of the said defendant on the interrogatories of the defendant which were attached to, or enclosed with, the said commission, and upon none others.

The said A. F. Root, being first duly sworn, by me, as a witness to the said cause, previous to the commencement of her examination, to testify the truth, as well on the part of the plaintiff, as the defendant, in relation to the matters [134] in controversy between the said plaintiff and defendant, so far as she should be interrogated, testified and deposed as follows:

Int. 1. Are you Mrs. A. F. Root, the wife of R. T. Root? A. Yes.

Int. 2. State whether you had any conversation with F. W. Lowery at the railroad station in Denver as you and your husband were leaving for Los Angeles, on or about June 24th, 1913, and if so, what was said? A. I did not.

Int. 3. State whether or not you said on that occasion to Mr. Lowery in substance that you knew the purpose of the journey to California was to negotiate a sale of the \$16,000 mortgage on the Norma

Mining Company properties and that you hoped that it would be successful. A. I did not.

Int. 4. State whether you told Mr. Lowery on that occasion, or on any other occasion, that you and your husband were going to California to get money to pay off the checks held by Mackay and expected to get it upon a mortgage of the Norma properties which had been authorized and which you hoped to sell for \$25,000, or to that effect.

A. I did not.

Int. 5. State whether you ever had any knowledge or information of the execution of either or any mortgage of the Norma Mining Company properties.

A. No, I did not.

Int. 6. Please state what interest, if any, you had in the Norma Mining Company.

A. I have all the interest, except three shares.

[135]

Int. 7. State whether you saw Dr. Geierman in Los Angeles on or about July 28th, 1913.

A. I did.

Int. 8. State whether on that occasion, or any other time in Los Angeles, you said to Dr. Geierman that Mr. Root owned a great deal of property which was not bringing in any money and he was in need of money, and if he would assist to get a loan on the White Hills property Mr. Root would soon be able to pay him. Dr. Geierman's, money that was past due. A. No, I did not.

Int. 9. Was there ever any such conversation between you and the doctor? A. No.

Int. 10. State whether you saw Dr. Geierman in

New York in June or July, 1914. A. I did.

Int. 11. Did he on that occasion ask you if Mr. Root still owned the White Hills property?

A. No.

Int. 12. And did you answer the question yes.

A. No.

Int. 13. Was the company indebted to your husband, Mr. R. T. Root, in any amount? A. No.

Int. 14. Did you have any conversation with Hugh Mackay about a mortgage on the Norma Mining Company or White Hills properties in Los Angeles in June 1913, and if so, what was said?

A. No, I did not. [136]

Int. 15. Did you say to him at the Alexandria Hotel, or any other time or place, that you thought the mortgage should be made for \$25,000? A. No.

Int. 16. And did you in that connection give as a reason that you wanted Mr. Root to have what money he needed in his business or to that effect?

A. No.

A. F. ROOT. [137]

*In the District Court of the United States, Northern
District of Illinois, Eastern Division.*

No. 33.—(PHX.)

HUGH MACKAY,

Complainant,

vs.

NORMA MINING COMPANY,

Defendant.

State of Illinois,
County of Cook,—ss.

I, hereby certify that on the 3d day of November, A. D. 1915, before me, Richard H. Wyman, a notary public in and for the County of Cook and State of Illinois, at my office Suite No. 1301, No. 155 North Clark Street, in the City of Chicago, County of Cook and State of Illinois, personally appeared, pursuant to the notice thereto annexed, at the hour of 10 o'clock A. M., the witness named in said notice, and the said Mrs. A. F. Root being by me first duly cautioned and sworn, to testify the whole truth, and being carefully examined, deposed and said, as appears by the deposition hereto annexed.

And I further certify that the said deposition was then and there reduced to typewriting under my personal supervision and was, after it had been reduced to typewriting subscribed by the witness and the same has been retained by me for the purpose of sealing up and directing the same to the Clerk, as required by law.

And I further certify that the reason why the said deposition was taken was that the said witness resides at [138] Chicago, more than one hundred miles from Phoenix, Arizona, the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

And I further certify that the fee for taking said

deposition, \$5.00, has been paid to me by the defendant and the same is just and reasonable.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at the City of Chicago, in the County of Cook and State of Illinois, this 3d day of November, A. D. 1915.

[Seal]

RICHARD H. WYMAN,
Notary Public.

My commission expires October 30th, 1916.

RICHARD H. WYMAN,
Notary Public. [139]

*In the United States District Court for the District
of Arizona.*

No. 33.—(PHX.)

HUGH MACKAY,

Complainant,

vs.

THE NORMA MINING COMPANY,

Defendant.

United States of America,

District of Arizona,—ss.

Commission to Take Deposition.

The President of the United States of America, to
Richard H. Wyman, a Notary Public, in and for
the County of Cook, State of Illinois, Chicago,
Illinois, Greeting:

KNOW YE that you are hereby appointed a commissioner with full power and authority to examine, under oath, A. F. Root, upon the direct interrog-

atories hereto attached, at your office, No. 155 North Clark Street, in the City of Chicago, State of Illinois, on the third day of November, 1915, commencing at the hour of 10 o'clock A. M. and continuing thereafter from time to time until completed, as witness for the defendant in a certain cause now pending in the United States District Court for the District of Arizona, wherein Hugh Mackay is plaintiff and the Norma Mining Company is defendant; such deposition to be taken upon said interrogatories hereto attached and to reduce to writing the answers of said witness given in response to said interrogatories and return said interrogatories and answers thereto in manner and form as provided by law for the return of depositions.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona, and the seal of said court affixed hereto at Phoenix, Arizona, this 29th day of October, 1915.

[Seal]

GEORGE W. LEWIS,
Clerk.

By R. E. L. Webb,
Deputy. [140]

MACKAY,

vs.

NORMA MINING COMPANY.

(1) Are you Mrs. A. F. Root, the wife of Mr. R. T. Root?

(2) State whether you had any conversation with F. W. Lowery at the railroad station in Denver

as you and your husband were leaving for Los Angeles, on or about June 24th, 1913, and if so what was said?

(3) State whether or not you said on that occasion to Mr. Lowery in substance that you knew the purpose of the journey to California was to negotiate a sale of the \$16,000 mortgage on the Norma Mining Company properties and that you hoped that it would be successful.

(4) State whether you told Mr. Lowery on that occasion, or on any other occasion, that you and your husband were going to California to get money to pay off the checks held by Mackay and expected to get it upon a mortgage of the Norma properties which had been authorized and which you hoped to sell for \$25,000, or to that effect.

(5) State whether you ever had any knowledge or information of the execution of either or any mortgage of the Norma Mining Company properties.

(6) Please state what interest, if any, you had in the Norma Mining Company.

(7) State whether you saw Dr. Geierman in Los Angeles on or about July 28th, 1913.

(8) State whether on that occasion, or any other time in Los Angeles, you said to Dr. Geierman that Mr. Root owned a great deal of property which was not bringing in any money and he was in need of money and if he would assist to get a loan on the White Hills property Mr. Root would soon be able to pay him, Dr. Geierman's, money that was past due.

(9) Was there ever any such conversation between you and the doctor?

(10) State whether you saw Dr. Geierman in New York in June or July, 1914. [141]

(11) Did he on that occasion ask you if Mr. Root still owned the White Hills property?

(12) And did you answer the question "Yes"?

(13) Was the company indebted to your husband, Mr. R. T. Root, in any amount?

(14) Did you have any conversation with Hugh Mackay about a mortgage on the Norma Mining Company or White Hills properties in Los Angeles in June 1913, and if so what was said?

(15) Did you say to him at the Alexandria Hotel, or any other time or place, that you thought the mortgage should be made for \$25,000?

(16) And did you in that connection give as a reason that you wanted Mr. Root to have what money he needed in his business or to that effect? [142]

(Endorsements on Back of Cover of Deposition:)

No. ——. In the United States District Court, for the District of Arizona. Hugh Mackay, Complainant, vs. Norma Mining Company, Defendant. Commission to Take Deposition. [143]

(Address and endorsements on envelope containing the foregoing deposition:)

GEORGE W. LEWIS, ESQ.

Clerk, U. S. District Court,

Phoenix, Arizona.

After five days return to RICHARD H. WYMAN,
1301-4 Ashland Block, Chicago.

(Endorsements on end of envelope:)

In the District Court of the U. S. District of Arizona. No. 33.—(Phx.) Hugh Mackay, Complainant, vs. Norma Mining Company. Deft. Deposition of Mrs. A. F. Root, on Behalf of Defendant. Richard H. Wyman, Notary Public.

Filed Jan. 17, 1916, George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Opened in open Court by order of Court Jan. 20, 1916. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

(Envelope sealed with two seals by notary public.)

[144]

**Plaintiff's Exhibit "A" for Identification—Note,
August 2, 1913, Norma Mining Co. to Mackay.**

\$16,000.00 DENVER, COLO., AUG. 2ND, 1913.

FOUR MONTHS after date THE NORMA MINING COMPANY promise to pay to the order of HUGH MACKAY—SIXTEEN THOUSAND DOLLARS.

Value received with interest at SIX per cent per annum.

No. ——. Due ——.

THE NORMA MINING COMPANY,

By R. T. ROOT,

President.

(Endorsement on back of note:)

HUGH MACKAY.

Marked Plff's. Ex. "A" for Identification. Admitted and Filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No, E-6—

Prescott. Hugh Mackay vs. Norma Mining Company. [145]

Plaintiff's Exhibit "B" for Identification—Realty Mortgage—August 2, 1913, Norma Mining Co. to Mackay.

REALTY MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS:

That The Norma Mining Company, a corporation duly organized and existing under the laws of the State of Arizona, Mortgagor, State of Arizona, for and in consideration of SIXTEEN THOUSAND (\$16,000) DOLLARS, to it in hand paid by Hugh MacKay, Mortgagee, has granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Hugh MacKay all that certain premises described as follows, to wit: The following Mining Claims, situate, lying and being in the Indian Secret Mining District, in the County of Mohave, and State of Arizona, viz.: The Putman, The Review, The West Half of The Hulda, The Bonita, The Mountain Scenery, The Chief of the Hill, The Monster, The Peer, The Midway Extension, The Garfield Fraction, The Acquarius, The Grand Central, The Western View, The Lone Star, The Blind Goddess, The Desert Prospect, The Goadstick, The Norma Fraction, The G. A. R. Fraction, The Oversight, The Buckley, The Nora R, The Big Joshua, The Lookout, The Abe Lincoln, The Ellington, The Hillside, The Center, The Little Giant, The Midway, The Prince Albert, The Orient, The Squattum, The Horn Silver, The Rip Van Winkle, The African,

The Norma, The Garfield, The Schaefer's Treasure, The Fraction Quartz, The Emma, The Nellie Blye, The Occident, The Junction, The G. A. R., and The Daisy Mining Claims, together with the mill and machinery therein and the different hoisting plants upon the property.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Hugh MacKay, his heirs and assigns forever.

This Conveyance is intended as a Mortgage to secure the payment of One certain Promissory Note, given by the said Mortgagor [146] of date August the second, A. D. 1913, which said note is in words and figures following, to wit:

\$16,000

Denver, Colo., Aug. 2d, 1913.

Four months after date The Norma Mining Co. promises to pay to the order of Hugh Mackay Sixteen Thousand Dollars at Denver, Colo. Value received with interest at six per cent per annum.

THE NORMA MINING CO.

By R. T. ROOT,

President.

In executing this instrument the Mortgagor reserves the right to mine ore and to operate this property in the usual and customary way of mining and operating such property, taking and using any and all proceeds, incomes and profits from said property as fully and to the same extent as if this indenture had not been made, until the property may be sold and conveyed under this mortgage by

reason of default of the payment provided herein, in event that such default should occur.

This instrument is hereby executed and delivered by R. T. Root, as president, by order of the Board of Directors of this Company and said execution and delivery is duly ratified by a meeting of the stockholders of the company at which all shares of stock issued was represented and unanimously voted in favor thereof.

And this instrument shall be void if said Promissory Note, principal and interest be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said Promissory Note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said Promissory Note mentioned, then, and in such case, the principal sum of said note and the interest thereon shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said Mortgagee, his heirs, executors, administrators and assigns, for the recovery of the same, either [147] by suit on said Note or on this Mortgage and Note; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said Mortgagee, his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, attorneys' fee not exceeding — per cent thereon upon the amount found due the plaintiff on said Note and this Mortgage, or in case of settlement after suit brought, but before judgment

rendered, then — per cent on amount found due at the time of settlement, as well as all payments that the said Mortgagee — heirs, executors, administrators, or assigns may be obliged to make for — security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Executed this second day of August, A. D. 1913.

THE NORMA MINING COMPANY.

By R. T. ROOT,

President.

Signed, sealed and delivered in the presence of

J. M. CLEMENTS.

[Seal of the Norma Mining Company Incorporated.]

State of California,

County of Los Angeles,—ss.

On this 2d day of August, A. D. 1913, before me, Ina Eveished, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared R. T. Root, known to me to be the President of the Norma Mining Company, the Corporation that executed the within Instrument, known to me to be the person who executed the within Instrument, on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same, as its free act and deed for the purposes therein expressed and that the same was by him *voluntary* executed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Seal]

INA EVEISHED,

Notary Public in and for said County, State of California. [148]

(Endorsements on back of foregoing Mortgage.)

No. —

REALTY MORTGAGE

From

THE NORMA MINING COMPANY

to

HUGH MACKAY.

Dated — 189—.

Filed and recorded at request of Robinson and Robinson. August 29th, A. D. 1914, at 9 o'clock A. M. Book 4 of Mortgages, pages 172, 173.

J. W. MORGAN,

County Recorder.

[Seal of the County Recorder, Mohave County, Arizona.]

(Notation.)

Marked Plff's. Ex. "B," for identification. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackay vs. Norma Mining Company. [149]

Plaintiff's Exhibit "C" for Identification—Note,

March 31, 1914, Norma Mining Co. to Mackay.

\$3,500.

DENVER, COLO., MARCH 31st, 1914.

ON OR BEFORE MAY 1ST, 1914, after date It promise to pay to the order of HUGH MACKAY,

THIRTY-FIVE HUNDRED DOLLARS at SEVEN
PER CENT INTEREST PER ANNUM.

Without defalcation, for value received.

THE NORMA MINING COMPANY.

By R. T. ROOT,
President.

(Endorsements on back of note:)

HUGH MACKAY.

(Notations.)

Marked Plff's. Ex. "C" for Identification. Ad-
mitted and filed Aug. 23, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. Case No. E-6—
Prescott. Hugh Mackay. Norma Mining Co.
[150]

Plaintiff's Exhibit "D" for Identification—Note,
March 31, 1914, Norma Mining Co. to Mackay.
\$1,500.

DENVER, COLO., MARCH 31ST, 1914.

ON OR BEFORE MAY 1ST, 1914, after date IT
promise to pay to the order of HUGH MACKAY,
FIFTEEN HUNDRED DOLLARS at SEVEN PER
CENT INTEREST PER ANNUM.

Without defalcation, for value received.

THE NORMA MINING COMPANY.

By R. T. ROOT,
President.

(Endorsement on back of note:)

HUGH MACKAY.

(Notation.)

Marked Plff's. Ex. "D" for Identification. Ad-
mitted and filed Aug. 23, 1915. George W. Lewis,

Clerk. By Effie D. Botts, Deputy. Case No. E-6—
Prescott. Hugh Mackay vs. Norma Mining Co.
[151]

**Plaintiff's Exhibit "E" for Identification—Mort-
gage, March 31, 1914, Between Norma Mining
Co. to Mackay.**

THIS INDENTURE, made the thirty-first day of
March in the year one thousand nine hundred and
fourteen

BETWEEN THE NORMA MINING COM-
PANY, a corporation duly organized and existing
under the laws of the State of Arizona, party of the
first part, and

HUGH MACKAY, of the City and County of Den-
ver, State of Colorado, party of the second part:

WHEREAS, the said Norma Mining Company,
party of the first part, is justly indebted to the said
party of the second part, in the sum of Five Thou-
sand (\$5,000) Dollars, lawful money of the United
States, secured to be paid by two notes or obligation,
bearing even date herewith, conditioned for the pay-
ment of the said sum of Five Thousand (\$5,000)
Dollars, one note for Fifteen Hundred (\$1500) Dol-
lars and one note for Thirty-five Hundred (3500)
Dollars, payable on or before May 1st, 1914, with in-
terest at the rate of seven per cent (7%) per annum.

IT BEING THEREBY EXPRESSLY AGREED,
That the whole of the said principal sum shall be-
come due after default in the payment of interest,
taxes, or assessment, as hereinafter provided.

NOW THIS INDENTURE WITNESSETH, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant and release unto the said party of the second part, and to his heirs and assigns, forever, ALL the following described patented mining claims, situate, lying and being in the County of Mohave and State of Arizona, to wit, in Indian Secret Mining District in said [152] Mohave County, Arizona, viz.:

The Putman, the Review, the West Half of the Hulda, the Bonita, the Mountain Scenery, the Chief of the Hill, the Monster, the Peer, the Midway Extension, the Garfield Fraction, the Acquarius, the Grand Central, the Western View, the Lone Star, the Blind Goddess, the Desert Prospect, the Goadstick, the Norma Fraction, the G. A. R. Fraction, the Oversight, the Buckley, the Nora R., the Big Joshua, the Lookout, the Abe Lincoln, the Ellington, the Hillside, the Center, the Little Giant, the Midway, the Prince Albert, the Orient, the Squattum, the Horn Silver, the Rip Van Winkle, the African, the Norma, the Garfield, the Schaefer's Treasure, the Fraction Quartz, the Emma, the Nellie Blye, the Occident, the Junction, the G. A. R., and the Daisy Mining Claim; together with all the dips, spurs and angles, and all the metals, ores, gold and silver bearing quartz, rock and earth therein, the old dump

now thereon, and together with the Mill and machinery therein and the different hoisting plants on the property.

Until default shall be made in payments of principal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of the second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed, and every part and parcel thereof, with the full right and privilege of developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property, and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made.

The execution of this mortgage was duly authorized by a meeting of the stockholders of said THE NORMA MINING COMPANY at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a resolution authorizing the execution and delivery hereof, and was also authorized by a resolution of its Board of Directors duly adopted by unanimous vote at a meeting at which all of the directors of said Company were present.

TOGETHER with the appurtenances, and all the

estate and rights of the party of the first part in and to the said premises.

TO HAVE AND TO HOLD the above granted premises unto the said party of the second part, his heirs and assigns forever.

There is a mortgage by aforesaid Grantor to aforesaid Grantee on said property for Sixteen Thousand (\$16,000) Dollars, and some taxes, all of which the Grantor will pay.

PROVIDED ALWAYS, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said [153] party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine, and be void.

AND the said party of the first part covenant with the party of the second part as follows:

FIRST. That ———, the party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises herein described, according to law.

SECOND. That the said party of the first part will execute any further necessary assurance of the title to said premises and will forever warrant said title.

THIRD.

FOURTH. And it is hereby expressly agreed

that the whole of said principal sum shall become due and payable as provided in said notes.

IN WITNESS WHEREOF, the said party of the first part, The Norma Mining Company has hereunto caused these presents to be signed by its President and attested by its Secretary and the seal of said Company to be hereto affixed this thirty-first day of March, A. D. 1914.

THE NORMA MINING COMPANY. [Seal]

By R. T. ROOT, [Seal]
President.

ATTEST: W. W. ROOT,
Secretary.

[Seal of the Norma Mining Company Incorporated.]

[154]

State of New York,
County of New York,—ss.

Before me, Geo. F. Brelsford, a Notary Public in and for said County and State, on this day personally appeared R. T. Root, known to me to be the President of the Norma Mining Company, the Corporation described in the foregoing instrument, and known to me to be the person whose name is subscribed to the foregoing instrument as President of said Company, and, as such Officer, acknowledged to me that he executed the said instrument for said corporation for the purpose and consideration therein expressed, as the free act and deed of said Corporation and that it was by him voluntarily executed.

Given under my hand and seal of office this 31st day of March, A. D. 1914.

My Commission expires March 30, 1916.

[Seal]

GEO. F. BRELSFORD,

Notary Public, New York County #239, N. Y. Register No. 6230.

(Endorsements on back of Mortgage:)

THE NORMA MINING COMPANY

TO

HUGH MACKAY.

MORTGAGE.

Filed and recorded at request of Robinson and Robinson. August 29th, A. D. 1914, at 9 o'clock A. M., in Book 4 of Mortgages, pages 170 et seq. Records of Mohave County, Arizona.

J. W. MORGAN,

County Recorder.

(Notation on back of Mortgage:)

Marked Plff's. Ex. "E" for Identification. Admitted and Filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackay vs. Norma Mining Company. [155]

**Plaintiff's Exhibit "F" for Identification—Option,
February 20, 1908, Root to Mackay.**

OPTION.

For value received, I hereby give to Hugh Mackay the option to purchase the following described patented mining claims and personal property situated in the Indian Secret Mining District, at White Hills, Mohave County, Arizona, to wit:

The G. A. R., the Fraction Quartz, the Nora R.,

the Schaefer's Treasure, the west half of the Hulda, the Grand Central, the Oversight, the Emma, the Putman, the Mountain Scenery, the Review, the Chief of the Hill, the Monster, the Bonita, the Nellie Bly, the Garfield, the Blind Goddess, the G. A. R. Fraction, the African, the Norma, the Garfield Fraction, the Prince Albert, the Abe Lincoln, the Big Joshua, the Daisy, the Norma Fraction, the Goadstick, the Midway Extension, the Rip Van Winkle, the Occident, the Western View, the Desert Prospect, the Buckley, the Horn Silver, the Junction, the Orient, the Aquarius, the Little Giant, the Squattum, the Lookout, the Hillside, the Peer, the Ellington, the Midway, the Center, and the Lone Star mining claims. (Errors, if any, in aforesaid description, are subject to correction to correspond with the U. S. patents.) For a more particular description of said mining claims reference is hereby made to the U. S. patents therefor recorded in the office of the County Recorder of said Mohave County, Arizona.

This option is to include all of the buildings upon said mining claims, excepting the Church building and the lot upon which it is located, and the Public school Building, and about three or four other buildings belonging to other persons.

This option includes the mill, and also all of the equipments and personal property upon the following mining claims, viz.—the Grand Central, the G. A. R., the Schaefer's Treasure, the Norma and the Occident, excepting the gasoline engine near the

G. A. R., and the lathe in the Occident mill. No other personal property is included in this option.

This option is given upon the following terms:

The net price to be paid to me by said Mackay for said property is One Hundred and Seventy-five Thousand Dollars (\$175,000).

Any deed made under this option or any modification thereof is to be made to said Hugh Mackay.

This option shall continue in force for thirty days from the date hereof. Time is of essence of this option.

It is expressly understood that this instrument is an option only, giving said Mackay power only to purchase, and is in no way intended to appoint said Mackay as my agent, express or implied, to sell said property or any part thereof.

Witness my hand this 20th day of February, 1908.

R. T. ROOT.

(Notation on bottom in pencil:)

P. return this.

(Notation on back of paper:)

Marked Plff's. Exhibit "F" for Identification. Admitted and Filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6—Prescott. Hugh Mackay vs. Norma Mining Co. [156]

**Plaintiff's Exhibit "H" for Identification—Check,
4/6/1914, Robinson & Robinson to Mackay.**

No. 4290.

ROBINSON & ROBINSON,

Attys. at Law,
Continental Building.

DENVER, COLO., 4/6/1914.

Pay to the order of HUGH MACKAY \$1810.00
ONE THOUSAND EIGHT HUNDRED TEN and
NO/100 DOLLARS.

ROBINSON & ROBINSON,
By P. J. ROBINSON.

The Federal National Bank,
Denver, Colo.

(Endorsements on back of check:)

Pay to the order of W. W. ROOT,
HUGH MACKAY.

W. W. ROOT.

Received Payment Through Denver

6 Clearing House 6

Apr. 8, 1914

Denver National Bank.

53-56

Pay to the order of
Denver National Bank.

All prior endorsements guaranteed

Apr. 7, 1914.

The German American Trust Co.

2 Denver, Colo. 2

(Notation:)

Marked Plff. Exhibit "H" for identification. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [157]

**Plaintiff's Exhibit "I" for Identification, Check,
April 8, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17

DENVER, APR. 8th, 1914. No. —

Pay to the order of W. W. ROOT \$80.00 EIGHTY
00/100 DOLLARS.

HUGH MACKAY.

(Endorsements on back of note:)

W. W. ROOT.

23-56

Pay to the order of
Denver National Bank.

All prior endorsements guaranteed
APR. 8, 1914.

THE GERMAN AMERICAN TRUST CO.

2 Denver, Colo. 2

Received payment through Denver
Clearing House

6 APR. 9, 1914. 6

Denver National Bank.

Plff. Exhibit "I" for identification. Admitted and filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [158]

**Plaintiff's Exhibit "J" for Identification—Check,
April 9, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17.

DENVER, Apr. 9, 1914. No. 3.

Pay to the order of W. W. ROOT \$150.00 ONE
HUNDRED and FIFTY 00/100 DOLLARS.

HUGH MACKAY.

(Endorsements on back of check:)

W. W. ROOT.

By H. M. ROOT.

23-56

Pay to the order of

Denver National Bank.

All prior endorsements guaranteed

APR. 10, 1914.

THE GERMAN AMERICAN TRUST CO.

2 Denver, Colo. 2

Received payment through Denver
Clearing House

6 APR. 11, 1911. 6

Denver National Bank.

(Notation:)

Marked Plff. Exhibit "J" for identification. Ad-
mitted and filed. George W. Lewis, Clerk. By
Effie D. Botts, Deputy. E-6-Prescott. Hugh Mac-
kay vs. Norma Mining Co. [159]

**Plaintiff's Exhibit "L" for Identification—Check,
April 22, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17.

DENVER. APR. 22, 1914. No. 19.

**Pay to the order of W. W. ROOT \$1000.00 ONE
THOUSAND 00/000 DOLLARS.**

HUGH MACKAY.

(Endorsements on back of check:)

W. W. ROOT.

23-56

Pay to the order of

DENVER NATIONAL BANK

All prior endorsements guaranteed

APR. 22, 1914.

THE GERMAN AMERICAN TRUST CO.

2 Denver, Colo. 2

**Received payment through Denver
Clearing House**

6 APR. 23, 1914. 6

DENVER NATIONAL BANK.

(Notation:)

**Marked Plff. Exhibit "L" for identification. Ad-
mitted and filed Aug. 25, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. E-6-Prescott.
Hugh Mackay vs. Norma Mining Co. [160]**

**Plaintiff's Exhibit "M" for Identification—Check,
April 22, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17.

DENVER, APR. 22, 1914. No. 20.

Pay to the order of W. W. ROOT \$500.00 FIVE
HUNDRED 00/100 DOLLARS.

HUGH MACKAY.

(Endorsements on back of ~~note~~ check:)

W. W. ROOT.

23-56

Pay to the order of

DENVER NATIONAL BANK

All prior endorsements guaranteed

APR. 22, 1914.

THE GERMAN AMERICAN TRUST CO.

2 Denver, Colo. 2

RECEIVED PAYMENT THROUGH DENVER
CLEARING HOUSE

6 APR. 23, 1914. 6

DENVER NATIONAL BANK

(Notation:)

Marked Exhibit "M" for identification. Ad-
mitted and filed Aug. 25, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. E-6-Prescott.
Hugh Mackay vs. Norma Mining Co. [161]

**Plaintiff's Exhibit "N" for Identification—Check,
April 23, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17.

DENVER, APR. 23, 1914. No. 29.

Pay to the order of W. W. Root \$125.00 ONE
HUNDRED and TWENTY-FIVE 00/100 DOL-
LARS.

HUGH MACKAY.

(Endorsements on back of check:)

W. W. ROOT.

23-56

Pay to the order of

DENVER NATIONAL BANK

All prior endorsements guaranteed

APR. 23, 1914.

THE GERMAN AMERICAN TRUST CO.

2 Denver, Colo. 2

RECEIVED PAYMENT THROUGH DENVER
CLEARING HOUSE

6 APR. 24, 1914. 6

DENVER NATIONAL BANK.

(Notation:)

Marked Plff. Exhibit "N" for identification. Ad-
mitted and filed Aug. 25, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. Hugh Mackay
vs. Norma Mining Co. [162]

**Plaintiff's Exhibit "O" for Identification—Check,
April 25, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17.

DENVER, APR. 25, 1914. No. 33.

Pay to the order of W. W. Root \$183.58 ONE
HUNDRED and EIGHTY-THREE. 58/100 DOL-
LARS.

HUGH MACKAY.

(Endorsements on back of check:)

W. W. ROOT.

23-56

Pay to the order of

DENVER NATIONAL BANK

All prior endorsements guaranteed

APR. 25, 1914.

THE GERMAN AMERICAN TRUST CO.

3 Denver, Colo.

RECEIVED PAYMENT THROUGH DENVER
CLEARING HOUSE

6 APR. 27, 1914. 6

DENVER NATIONAL BANK.

(Notation:)

Marked Plff. Exhibit "O" for identification. Ad-
mitted and filed Aug. 25, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. E-6-Prescott.
Hugh Mackay vs. Norma Mining Co. [163]

**Plaintiff's Exhibit "P" for Identification—Check,
April 21, 1914, Mackay to Root.**

THE FEDERAL NATIONAL BANK 23-17.

DENVER, APR. 21, 1914. No. 17.

**Pay to the order of Walter W. Root \$7.00 SEVEN
00/100 DOLLARS.**

HUGH MACKAY.

(Endorsements on back of check:)

WALTER W. ROOT.

W. W. ROOT.

23-56

**Pay to the order of
DENVER NATIONAL BANK.**

All prior endorsements guaranteed

APR. 21, 1914.

THE GERMAN AMERICAN TRUST CO.

2 Denver, Colo. 2

**RECEIVED PAYMENT THROUGH DENVER
CLEARING HOUSE**

6 APR. 22, 1914. 6

DENVER NATIONAL BANK.

(Notation:)

**Marked Plff. Exhibit "P" for identification. Ad-
mitted and filed Aug. 25, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. E-6-Prescott.
Hugh Mackay vs. Norma Mining Co. [164]**

**Plaintiff's Exhibit "Q" for Identification—Note,
November 24, 1913, Root to Meier.**

\$450.00

DENVER, COLO., NOV. 24, 1913.

ON OR BEFORE DEC. 1st, 1913, after date I
promise to pay to the order of THEODORE L.
MEIER, FOUR HUNDRED and FIFTY —
DOLLARS at DENVER, COLO.

Value received with interest at SIX per cent per
annum. No. ——. Due ——.

R. T. ROOT.

(Endorsements on back of note:)

HUGH MACKAY.

Without recourse.

THEODORE L. MEIER.

(Notation:)

Marked Plff. Exhibit "Q" for identification. Ad-
mitted and filed Aug. 25, 1915. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. E-6-Prescott.
Hugh Mackay vs. Norma Mining Co. [165]

**Plaintiff's Exhibit "R" for Identification—Note,
December 1, 1913, Root to Meier.**

\$500.00

DENVER, DEC. 1st, 1913.

ON DEMAND after date I promise to pay to the
order of THEODORE MEIER, FIVE HUNDRED
DOLLARS at DENVER, COLO.

Value received with interest at SIX per cent per annum. No. ——. Due ——.

R. T. ROOT.

(Endorsements on back of note:)

HUGH MACKAY.

Without recourse on me.

THEODORE MEIER.

(Notation:)

Marked Plff. Exhibit "R" for identification. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [166]

**Plaintiff's Exhibit "T" for Identification—Note,
November 25, 1912, Treasure Mining and Re-
duction Co. to Mackay.**

\$2500.00. DENVER, COLO., NOV. 27TH, 1912.

DEC. 11TH, 1912, after date WE promise to pay to the order of HUGH MACKAY, TWENTY-FIVE HUNDRED DOLLARS at DENVER, Colo.

Value received with interest at SIX per cent per annum. No. ——. Due ——.

THE TREASURE MINING AND REDUC-
TION CO.

By R. T. ROOT,
General Manager.

(Endorsements on back of note:)

Notice protest and nonpayment waived.

R. T. ROOT.

Decemb. 15, 1912.

Paid on within note \$1250.00.

Apr. 22d, 1913.

This note is paid by the sum of \$1284.10 being credited thereon and charged to amount of \$3000.00 due Root for notes of \$3250.00 given to Est. dated Apr. 22, 1913, and for which 3000 Mackay gave Root his personal due bill for Sept. 1, 1913.

(Notation:)

Plff's. Exhibit "T" for identification. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [167]

**Plaintiff's Exhibit "U" for Identification—Note,
November 27, 1912, Treasure Mining and Re-
duction Co. to Mackay.**

\$2500.00.

DENVER, COLO., NOV. 27TH, 1912.

DEC. 11TH, 1912, after date WE promise to pay to the order of HUGH MACKAY, TWENTY-FIVE HUNDRED DOLLARS at DENVER, COLO.

Value received with interest at SIX per cent per annum, after due.

THE TREASURE MINING AND REDUC-
TION CO.

No. ——. Due ——.

By R. T. ROOT,
General Manager.

(Endorsements on back of note:)

Notice protest and nonpayment waived.

R. T. ROOT.

Decemb. 15th, 1912.

Paid on within note \$1250.00.

Apri. 22, 1913.

R. T. Root gets credit for Bal. of this note in full \$1284.10, same being charged as an offset against the sum of \$3000.00 due Root on his note given Miller Est. dated Apr. 22, 1913, for which \$3000.00 Mackay gave R. T. Root his personal due bill for Sept. 1, 1913.

(Notation on back of note:)

Plff. Exhibit "U" for identification. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [168]

**Plaintiff's Exhibit "V" for Identification—Receipt,
July 18, 1912, Root to Mackay.**

R. T. ROOT.

Box 114, DENVER, COLO.

July 18, 1912.

Received from Hugh Mackay Bonds #84, 85, 86, 87 and 88, for \$1000.00 each, making total \$5000.00 of the Treasure Mining and Reduction Co. maturing March 1st, 1914. I will return these bonds to you within 10 days or pay you within that time the balance due on the two notes for which they are held as collateral.

These notes dated Nov. 27th, 1912.

R. T. ROOT.

(Endorsement on back of paper:)

Mackay's interest in proceeds received by Root from the sale of the bonds mentioned in within receipt, viz. \$258.20 has been charged to Root, Apr. 22, 1913.

(Notation:)

Plff. Exhibit "V" for identification. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [169]

**Defendant's Exhibit 1 for Identification—Receipt,
August 2, 1913, Mackay to Root.**

HOTEL ALEXANDER.

Los Angeles, Aug. 2d, 1913.

Received from R. T. Root a note for \$16000.00 of this date due to my order in 4 months, and a mortgage on 46 patented mining claims in White Hills, Mohave Co., Arizona, executed to me to secure said note, and both the note and the mortgage are executed by the Norma Mining Co. (an Arizona corporation), and said Root informs me that the said 46 mining claims stand in the name of said company on the records of said County.

I have recvd this mortgage and note for the purpose of selling them, and if sold pay from the proceeds recvd from their checks aggregating about \$10,000.00 held by me as executor of the George Miller Estate, which said checks are signed by said Root, and after paying said checks the net balance recvd for said note and mortgage is to be turned over to said Root by me. Said Root says he is now negotiat-

ing for a loan upon said property. If he makes a loan he is to make a mortgage on said property and notify said Mackay and if Mackay has not sold said note and mortgage first referred to herein, he is to return same to me, or if said Mackay fails to sell said note and mortgage within one month from date he is to return them to me and the said mortgage first herein referred to is not to be recorded unless sold by said Mackay or his assistants. Said note and Mortgage was first made for \$20,000.00 but afterwards & before I received them they were changed to \$16,000.00 in lieu thereof.

HUGH MACKAY.

(Notation on back of paper:)

Marked Defts. Exhibit #1 for identification. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [170]

**Defendant's Exhibit 2 for Identification—Receipt,
March 31, 1914, Mackay to Root.**

No. —

New York City, N. Y. Mch. 31, 1914.

NEW YORK CITY, N. Y. MCH. 31, 1914.

Recvd. from R. T. Root two notes, one for 3500 and the other for 1500, together with a mortgage to same, executed by the Norma Mining Co., on 46 patent mining claims at White Hills, Mohave Co. Arizona. Said notes due on or before May 1/14 and payable to the order of Hugh Mackay.

Recvd for purpose of loan for those amount. If loan made the said notes and mortgage returned to me or to either of my sons.

The money also may be paid to H. M. Root or W. W. Root.

HUGH MACKAY.

(Notation on back.)

Marked Defts. Exhibit #2 for identification. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackay vs. Norma Mining Co. [171]

Defendant's Exhibit 3—Check, June 9, 1913, Root to Mackay.

DENVER, COLORADO, JUNE 9TH, 1913.

No. —

COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX., \$1543.76, FIFTEEN HUNDRED FORTY-THREE and 76/100 DOLLARS.

R. T. ROOT.

(Written across face of check:)

Cancelled.

(Notation on back of check.)

Marked Defts. Exhibit #3. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [172]

No. —

**Defendant's Exhibit 4—Check, June 9, 1913, Root
to Mackay.**

DENVER, COLORADO, JUNE 9th, 1913.

No. —

COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$4,906.72, FOUR THOUSAND NINE HUNDRED
EIGHTY-SIX & 72/100 DOLLARS.

R. T. ROOT.

(Written across face of check:)

Cancelled.

(Notation on back of check.)

Marked Defts. Exhibit #4. Admitted and filed
Aug. 23, 1915. George W. Lewis, Clerk. By Effie
D. Botts, Deputy. No. E-6—Prescott. [173]

**Defendant's Exhibit 5—Check, May 29, 1913, Root
to Mackay.**

DENVER, COLORADO, MAY 29TH, 1913.

No. —

COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$416.81, FOUR HUNDRED SIXTEEN and 81/100
DOLLARS.

R. T. ROOT.

(Written across face of check:)

Cancelled.

(Notation on back of check.)

Admitted and filed Aug. 23, 1915. Marked Defts. Exhibit #5. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [174]

Defendant's Exhibit 6—Check, May 23, 1913, Root to Mackay.

No. X.

DENVER, COLORADO, MAY 23D, 1913.

COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$500.00 FIVE HUNDRED DOLLARS.

R. T. ROOT.

(Written across face of check:)

Cancelled.

(Notation on back of check.)

Marked Defts. Exhibit #6,. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [175]

Defendant's Exhibit 7—Check, May 29, 1913, Root to Mackay.

DENVER COLORADO, May 29TH, 1913.

No. —

COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$1288.89 TWELVE HUNDRED EIGHTY-EIGHT
& 89/100 DOLLARS.

R. T. ROOT.

(Notation on back of check.)

Marked Defts. Exhibit No. 7. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott.

(Written across face of check:)

Cancelled. [176]

Defendant's Exhibit 8—Check, June 11, 1913, Root to Mackay.

DENVER, COLORADO, JUNE 11TH, 1913.

No. —

COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$300, THREE HUNDRED DOLLARS.

R. T. ROOT.

(Notation on back of check.)

Marked Defts. Exhibit No. 8. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott.

(Written across face of check:)

Cancelled. [177]

Defendant's Exhibit 9—Note, September 16, 1911, Root to Mackay.

\$4455.00 DENVER, COLO., SEPT. 16th, 1911.

ON DEMAND after date I promise to pay to the order of HUGH MACKAY, Executor, FORTY-FOUR HUNDRED and FIFTY-FIVE DOLLARS at DENVER, COLO.

Value received with interest at SEVEN per cent per annum. NO. 1. DUE —.

R. T. ROOT.

(Endorsements on back of note:)

Aug. 2, 1913. Int. to date Cr. \$584.94.

From Aug. 2, 1913, Int. to be 6%.

(Notation on back of note.)

Marked Defts. Exhibit #9. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [178]

**Defendant's Exhibit 10—Note, December 13, 1911,
Root to Mackay.**

\$1400. DENVER, COLO., DEC. 13th, 1911.

ON DEMAND after date I promise to pay to the order of HUGH MACKAY, Executor, FOURTEEN HUNDRED DOLLARS at DENVER, COLO.

Value received with interest at SEVEN per cent per annum. NO. 2. DUE —.

R. T. ROOT.

(Endorsement on back of note:)

Aug. 2, 1913, Int. credited to date \$160.34.

From Aug. 2, 1913, Int. to be charged at rate of 6%.

(Notation on back of note.)

Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. Marked Defts. Exhibit #10. [179]

**Defendant's Exhibit 11—Note, December 19, 1912,
Root to Mackay.**

\$1655.00 DENVER, COLO., DEC. 19TH, 1912.

ON DEMAND after date I promise to pay to the order of HUGH MACKAY, Executor, SIXTEEN HUNDRED and FIFTY-FIVE DOLLARS at DENVER, COLO.

Value received with interest at SEVEN per cent per annum. NO. 3. Due —.

R. T. ROOT.

(Endorsements on back of note:)

Aug. 2, 1913. Int. credit to date \$71.77.

From Aug. 2, 1913, Int. to be 6%.

(Notation on back of note.)

Marked Defts. Exhibit #11. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [180]

Defendant's Exhibit 12—Note, April 22, 1913, Root to Mackay.

\$3250.00 DENVER, COLO., APR. 22nd, 1913.

ON DEMAND after date I promise to pay to the order of HUGH MACKAY, EXECUTOR, THIRTY-TWO HUNDRED and FIFTY DOLLARS at DENVER, COLO.

VALUE received with interest at SEVEN per cent per annum. NO. 4. DUE —.

R. T. ROOT.

(Endorsements on back of note:)

Int. credited to Aug. 2, 1913. \$63.19.

From Aug. 2, 1913, Int. to be charged at rate of 6% only.

(Notation on back of note.)

Marked Defts. Exhibit #12. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [181]

Defendant's Exhibit 13—Note, May 25, 1913, Root to Mackay.

\$1550.00 DENVER, COLO., MAY 25th, 1913.

ON DEMAND after date I promise to pay to the order of HUGH MACKAY, EXECUTOR, FIFTEEN HUNDRED and FIFTY DOLLARS at DENVER, COLO.

Value received with interest at SEVEN per cent per annum. NO. 5. DUE —.

R. T. ROOT.

(Endorsements on back of note:)

Int. Credited to Aug. 2, 1913. \$20.45.

From Aug. 2, 1913, to be 6%.

(Notation on back of note.)

Defts. Exhibit #13. Marked. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [182]

Defendant's Exhibit 14—Note, June 19, 1913, Root to Mackay.

\$1100.00. DENVER, COLO., JUNE 19th, 1913.

ON DEMAND after date I promise to pay to the order of HUGH MACKAY, EXECUTOR,

ELEVEN HUNDRED DOLLARS, at DENVER, COLO.

Value received with interest at SEVEN per cent per annum. No. 6. Due ——. R. T. ROOT.

(Endorsements on back of note:)

Int. to Aug. 2, 1913. Cr. \$9.35.

From Aug. 2, 1913, Int. to be 6%.

Marked Defts. Exhibit #14. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [183]

Defendant's Exhibit 15—Note, August 22, 1913, Root to Mackay.

\$2590.00. DENVER, COLO., AUG. 2nd. 1913.

ON DEMAND after date I promise to pay to the order of Hugh MACKAY EXECUTOR, TWENTY-FIVE HUNDRED and NINETY DOLLARS at DENVER, COLO.

Value received with interest at SEVEN per cent per annum. NO. 7. DUE ——. R. T. ROOT.

(Endorsements on back of note:)

This note represents the amt. of \$1680 Int. for 2 years on 14,000 note & 910. Int. on notes 1 to 6, to Aug. 2, 1913. \$2590.00, and Int. on this note to be charged at 6% from its date.

(Notation.)

Marked Defts. Exhibit #15. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. E-6—Prescott. [184]

Letter, June 19, 1913, Root to Mackay.

R. T. ROOT.

Box 114, Denver, Colo.

Denver, Colo., June 19, 1913.

Mr. Hugh Mackay, Ex. of Est. of G. Miller, Dec.

Denver, Colo.

Dear Sir:—

I need \$1000.00 temporarily—if you have it to spare in the Estate funds I will give you a check for it which you are to hold for 25 days and any time same is presented to the Bank upon which it is made after said 25 days it will be paid.

Recently I gave you checks, payable upon short notice, said checks were for demand loans which had been made to me by said Estate aggregating \$9036.18. I will also arrange so that at any time after 30 days from today, upon which said checks are presented for payment by yourself as executor at the bank upon which they are made, they the said checks shall be promptly paid.

I will also pay said estate interest on the amounts comprised in the aforesaid checks aggregating \$9036.18 from the dates of each check respectively until they are cashed at the rate of Seven per cent (7%) per annum and also on the amount of the aforesaid \$1000.00 in like manner.

R. T. ROOT.

Denver, Colo., June 19, 1913.

I, Hugh Mackay, Executor of the Estate of George Miller, dec., will give you the \$1000.00 as requested

having full confidence that you will do as you have stated.

HUGH MACKAY, ES. [185]

Marked Defts. Exhibit #16. Admitted and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackay vs. Norma Mining Co.

Defendant's Exhibit 17—Check, June 19, 1913, Root to Mackay.

Denver, Colorado, June 19th, 1913. No.
COLORADO NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$1,000.00, One Thousand DOLLARS.

R. T. ROOT.

(Written across face of check:)

“Cancelled.”

(Endorsement on back.)

Marked Defts. Exhibit #17. Admitted and Filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackay vs. Norma Mining Company. [186]

**Defendant's Exhibit 18—Receipt, April 22, 1913,
Root to Mackay.**

R. T. ROOT.

Box 114, Denver, Colo.

Denver, Colo., April 22, 1913.

Received from Hugh Mackay, Executor, \$3250.00
and gave my note on demand for same at 7% int. per
annum.

R. T. ROOT.

(Endorsements on back of note:)

Receipt for Note No. 4.

Int. pd. to Aug. 2, 1913. \$63.19.

The amount represented in this voucher has been
duly credited Root's Acct. in which he received full
value in cash and its equivalent from Hugh Mackay.

Marked Defts. Exhibit #18. Admitted and Filed
Aug. 23, 1915. George W. Lewis, Clerk. By Effie
D. Botts, Deputy. Case No. E-6—Prescott. [187]

**Defendant's Exhibit 19—Note, August 30, 1913,
Mackay to Root.**

R. T. ROOT.

Box 114, Denver, Colo.

DENVER, COLO., Aug. 30th, 1913.

This is to certify that on a certain matter I owe
R. T. Root, \$3000.00.

HUGH MACKAY.

(Notation on back of note.)

Defts. Exhibit #19. Admitted subject to plain-
tiff's objection. Filed Aug. 23, 1915. George W.

Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6—Prescott. Hugh Mackay vs. Norma Mining Co. [188]

Defendant's Exhibit 21—Excerpts from Minute-Book of Norma Mining Co.

(Taken from the Minute-Book of the Norma Mining Company, Pages 15, 16 and 17.)

JULY 15, 1911.

A duly called meeting of the board of directors of the Norma Mining Co. was held at ten o'clock A. M.

On Motion and ballot the resignation of F. W. Lowery as Secretary and also as director of said company was both accepted.

On Motion and ballot the resignation of F. W. Lowery as Vice-President of said Company was accepted.

One share of the Capital Stock of said Norma Mining Co. was transferred from F. W. Lowery to H. M. Root.

On Motion and ballot said H. M. Root was elected a director of the Norma Mining Company to fill the vacancy caused by the resignation of said Lowery.

On Motion and ballot H. M. Root was elected Secretary of the Norma Mining Company.

On Motion and ballot W. W. Root was elected Vice-President of the Norma Mining Co.

On Motion and ballot it was ordered that the deed of the property at White Hills, Arizona, from D. H. Moffat and wife to the Norma Mining Com-

pany be filed for record in the County recorder's Office at Kingman, Arizona.

On Motion and ballot it was ordered that H. M. Root personally take the said deed to Kingman, Arizona for record.

On Motion adjourned.

R. T. ROOT,
President.

H. M. ROOT,
Secretary.

DEC. 26th, 1911.

A meeting regularly called of the board of directors of the Norma Mining Co., was held at 10 o'clock A. M.

On Motion and ballot the following additional by-law was adopted and to be known as Article 15.

That the board of directors may meet in any town or City in any State or Territory of the United States at any time or at any different times for the purpose of supervising and conducting the affairs of this corporation and for transacting any business which might or could come before it for benefit of the Co. Any by-law or any part of any by-law of this Company in conflict with this Article 15 is hereby suspended. [189]

The minutes of the meeting of July 15, 1911, and the minutes of this meeting are read and approved.

On Motion adjourned.

R. T. ROOT,
President.

H. M. ROOT,
Secretary.

MARCH 1st, 1915.

A duly called meeting of the board of directors of the Norma Mining Co. Held at ten A. M.

The resignation of W. W. Root as Director and also as Vice-President of the Norma Mining Co. was offered and on Motion and ballot was accepted.

On Motion adjourned.

R. T. ROOT,
President.

H. M. ROOT,
Secretary.

MARCH 15, 1915.

A duly called meeting of the board of directors of THE NORMA MINING CO. was held at ten o'clock A. M.

One share of the capital stock of the Norma Mining Co. having been delivered by W. W. Root to Chas. W. Hoover.

On Motion and ballot said Chas. W. Hoover was elected a director of the Norma Mining Co.

On Motion and ballot Chas. W. Hoover was elected Vice-President of the Norma Mining Co.

The minutes of this meeting were read and approved.

The minutes of the meeting of March 1st, 1915 were read and approved.

On Motion adjourned.

R. T. ROOT,
President.

H. M. ROOT,
Secretary.

(Notation on cover of Minute-book.)

Defts. Exhibit #21. Admitted and filed Aug. 23, 1915. E-6-Prescott. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [190]

Defendant's Exhibit 20 for Identification—State-
ment of Account.

1910	Mackay to Root	Est. Loans Demand.	Mch. 28- Root to Mackay	
Mch. 2		150.00	Mch. 26	10.00
		75.	"	50.00
		100.	Apr. 5	20.00
		115	June 6	250.00
17			8	250.00
21		150		100.00
22		275	11	50.00
24		50	27	250.00
26				56.25
30		85	July 20	50.00
Apr. 12				
16		\$1000	25	150.00
May 6			27	50.00
16		500	Sep. 8	25.00
June 1			10-20	95.00
9	This loan dated Mch. 22, 1910, as per Est.	800	Oct. 7	30.00
			17	150.00
11	Report filed Sept. 2, 1911.			
	Total Amt. \$2300	250.00	18	100.00
29	Int. credited by Est. to Aug. 29, 1911, \$199.15	56.25	20	50.00
July 26		150.00	Nov. 2	150.00
Sept. 7		100.00	Dec. 1	250.00
Oct. 17		30.00	13	150.00
"		150.00	19	100.00
21		150.00	20	85.00
Nov. 2		150.00	Feb. 9	250.00
12		275.00	17	750.00

[illegible]

Marked Defts Exhibit #20 for Identification. Excluded and filed Aug. 23, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6-Prescott. Hugh Mackay vs. Norma Mining Co.

**Defendant's Exhibit 22—Letter, February 13, 1914,
Mackay to Root.**

HUGH MACKAY,
402 Exchange Building,
Denver, Colo.
P. O. Box, 195.

DENVER, COLO., FEB. 13, 1914.

Dear Mr. Root:

I wrote you yesterday, and hope I made it plain that there is no use of your expecting me to sell the 16000.00 note with 3000 taxes against the property, no abstract &c.

My impression is that if you expect the money to pay the estate from that source you better have a new mortgage properly made for enough to pay the estate and taxes and any expense in selling the mortgage.

However it is up to you now. I had to explain these loans, including Lowery's to the limit, and stated the facts, viz., that the money was obtained with the understanding that it would be paid on demand and as good as if in the bank. That I took the security when I could not get payment to prevent the possibility of a loss, that I acted in good faith in the matter, and that how I believed you would pay whenever you returned from New York

State, which I expected you would in ten days or two weeks, and as soon as you returned you would come up with me and would explain the transaction. Everything is left stand until you get here. I hope to goodness you will hustle the money and pay before then.

Truly yours,
HUGH MACKAY.

(Endorsements on back:)

Marked Defts. Exhibit #22. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [192]

**Defendant's Exhibit 23—Letter, February 12, 1914,
Mackay to Root.**

HUGH MACKAY,
402 Exchange Building,
Denver, Colo.
P. O. Box 195.

Denver, Colo., Feb. 12, 1914.

Mr. R. T. Root,
Dear Sir:

There is no use of your sending an indirect telegram saying for me to extend 16000 note &c. The 16000 note is over due and cannot be handled unless the taxes are paid or enough reserved out of the amount to pay them &c. It would not be enough to cover all. I wired you a man sort of promised to make a \$22000.00 loan at 8% 6 months \$1500.00 loans. Why did you not answer me. It would

take a tangible request from the maker to extend a note, and it should be direct. Anyhow the acknowledgment must be corrected on the mortgage before you could handle excepting with a person whom you would know and went by what you would tell him. I am notified that no further delay will be allowed in this matter. I got it staved off until you will return I said 10 days. I said on your return you would come up with me to the Court House and explain these loans. I had to admit that the loans were made temporarily on demand, that I believed they would be meet as stated, but had to take these securities when the time came. You can corroborate all I said. However, the money must be paid without delay. Get it some way even if you have to make a sacrifice, if you think the show is good to get it there I will come at once, although in all fairness you should send me expense money. You provide it for others.

HUGH MACKAY.

(Notation on side of letter.)

It is important that you advise me promptly of what you can do, unless settlement can be made this 16000 Mort. must be recorded, that I cannot prevent.

Marked Defts. Exhibit #23. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [193]

Defendant's Exhibit 24—Night-Lettergram, February 8, 1914, R. T. R. to H. M. R.

TELEGRAM.

WESTERN UNION.

NIGHT LETTER.

FEBY. 8th, 1914.

H. M. R.

Denver.

Tell Mackay to write nine months extension from December first on back of Norma note and get money from his man on that note if possible. It will be much easier to get that size note cashed but if he cant arrange it there tell him come here immediately and I will go with him to Brooks and others. Find Mackay early monday period. Has Morrison matter been answered.

R. T. R.

Defts. Exhibit #24. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6-Prescott. Hugh Mackay vs. Norma Mining Company. [194]

Defendant's Exhibit 25—Telegram, February 10, 1914, Mackay to Root.

TELEGRAM.

A314D AQU47 N L X

Denver, Colo., Feb. 10th, 1914.

R. T. ROOT, Western Union Main Office,
New York.

Serious prompt action necessary man says per-

haps he may take twenty-two at eight fifteen hundred B time six only cant you arrange matter there would come if party sends expense if not arrange new one two tens one two and mail cant change old one answer.

H. MACKAY,

144AM11th.

144AM11th. [195]

Marked Defts. Exhibit #25. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie R. Botts, Deputy. Case No. E-6-Prescott. Hugh Mackay vs. Norma Mining Company. [195]

**Defendant's Exhibit 26—Letter, August 9, 1913,
Mackay to Root.**

HUGH MACKAY,
401 Exchange Building,
Denver, Colo.
P. O. Box 195.

DENVER, COLO., Aug. 9, 1913.

Dear Mr. Root:

Mr. Wyberg left here the night before I arrived. If I had been a day sooner Mr. Robinson would have arranged for my presenting the matter, and then if he asked him for advice he would have done all he could to get it through. However, he said he would not go east after him with it. He said money would not hire him to do it. But he said if you see him, and that he refers the matter to me which he would then I shall do all in my power to get it through. But for him to go to him advising

him to loan on an old mining property he would not do it, but if Mr. Wyberg took the matter up with me, and asked his advice he would do the looking in to the title; and would recommend it as he had no doubt that it was good for the money.

Now two of the heirs will arrive here on the 18th, and wrote asking if I would be on hand. I wrote I would. Now would it not be best that I record this deed and have it ready. The amount will cover all necessary. It would only be a matter of the class of security with the Court and the heirs.

Now furthermore, we must sell it and get the cash. You had better take the first train for here and I will go with you to Wyberg, and I believe we can do the business, but in the mean time the only safe way for kind of preparation is to have it recorded so as to offer it as security. Wire what you think of this at once, and follow it up with a letter to me direct stating what to do, as I do not want to have to show your checks if I can help it.

Truly yours,

HUGH MACKAY.

Marked Defts. Exhibit #26. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Case No. E-6-Prescott. Hugh Mackay vs. Norma Mining Company.

**Defendant's Exhibit 27—Letter, September 6, 1913,
Mackay to Root.**

HUGH MACKAY,
402 Exchange Building,
Denver, Colo.
P. O. Box 195.

DENVER, COLO., Sept. 6, 1913.

Dear Mr. Root:

Another heir of the Miller Est. arrived from California in Denver Thursday night. Friday he put in his time at the office of the County Court Clerk. I did not know that he was expected here, and did not see him until he dropped in to my office Friday at 4 P. M. and announced who he was, after talking a little with him. I asked when he arrived, he said yesterday. This forenoon he said I went up to the County Court to the Office of the probate court to look up matters he desired information upon. Did not tell me anything further in the matter.

He said he understood I was to make a distribution of part of the Est. at this time. I said Yes, that I expected a loan one of the largest the Est. made to be paid within a few days, then I would file my report and include with it the order for distribution. Today, Saturday, I meet him by appointment, and went over matters with him again. I told him the mortgages given on the Arizona property I agreed to hold temporarily as the party expected to pay by Sept. 2nd, but was now out of the City, and that when he returned, which would be

within a few days, I had no doubt but that he would pay up. He said he would not keep mortgages without being recorded. I told him this was only temporarily, and that the party was good, a man of very large means as I understood the matter. He said all right I shall stay here until the matter is settled, and I may winter here he said. I said I was glad to hear that. I told him I did not expect to let the Est. lose one nickel that came in to my possession, or the increase therefrom. He said he believed it, but said in the event the loan from which you calculate to make the distribution is not paid in a few days, the mortgage must be recorded, either paid or recorded no matter what the security is.

I went over to Walter yesterday to wire you of his being here, and etc. I do not know whether he advised you or not. He told me you wire in N. Y. wanted Wiberg's address, I went to Robinson and got it and took it over at 2 P. M. No one was in, and I put it in through the door. I talked with him over the phone last night, he said he found the address at the house at noon.

Hope this matter may be cleaned up before I am called to Court House,

Truly yours,

HUGH MACKAY.

Marked Defts. Exhibit #27. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [197]

**Defendant's Exhibit 28—Letter, August 27, 1914,
Mackay to Root.**

HUGH MACKAY,
402 Exchange Building,
Denver, Colo.
P. O. Box 195.

DENVER, COLO., AUG. 27, 1914.

Mr. R. T. Root,

Dear Sir:

If there is a possibility on earth for you to get your friend there to buy and carry these two mortgages, get him to do it at the earliest possible moment.

The Heirs are raising Cain, and I held the mortgages without being recorded to the last minute, but had to give them up and they are recorded. If you can get some one to carry them temporarily for you do it by all means. If the mortgages are taken up that day note can be taken care of, and the securities taken out of the Bank. Then I think the Lowery loan can be strung along some way. But if this mortgages are not taken up there will be the worst trouble here for me you ever saw, and these heirs will bring you here to face the music too. The Court said it would lie with the heirs.

Surely you can get some one to carry the paper temporarily with all that property clear excepting taxes. The matter has been already investigated and there is a letter from the County Clerk & Recorder of Mohave County stating the property was

conveyed by deed dated 1905, & recorded in 1910 from David H. Moffatt & Francis Moffatt to the Norma Mining Co.; that there are no liens or encumbrances of record or no suits pending at the time. This letter is similar to an abstract and ought to help. I fear I cannot do anything here, no one would touch it with the taxes unpaid.

It will save me and yourself if you get a buyer there at once to carry it temporarily. If you cannot it will ruin me and likely yourself as these heirs are wild over their money. [198]

Hoping you wont leave a stone unturned, I am

Truly yours,

HUGH MACKAY.

Had you stayed away from Mr. Wiberg he would have done as he agreed, but your desired confidential talk did not strike him right. Let me know in some way at once if you can do anything as I am terribly worried and have reason to.

H. M.

Marked Defts. Ex. #28. Admitted and Filed Aug. 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [199]

**Defendant's Exhibit 30—Check, September 2, 1911,
Root to Mackay.**

DENVER, COLO., SEPT. 2d, 1911. No. —
FIRST NATIONAL BANK.

Pay to the order of HUGH MACKAY, EX.,
\$4,500.00 FOUR THOUSAND FIVE HUNDRED
DOLLARS.

R. T. ROOT.

(Written across face of check:)

This check return and cancelled June 9/13.

(Notation on back of check:)

Marked Defts. Exhibit #30. Admitted and filed
Aug. 25, 1915. George W. Lewis, Clerk. By Effie
D. Botts, Deputy. E-6-Prescott. Hugh Mackay
vs. Norma Mining Company. [200]

**Defendant's Exhibit 31—Letter, September 2, 1911,
Root to Mackay.**

SEPT. 2nd, 1911.

Mr. Hugh Mackay,
Denver, Colo.

Dear Sir:

I would like to get \$4500.00 temporarily, can you let me have it from your Millers' Estate? I can return it in from 10 to 30 days and will give you my check to hold and pay 8% int. I will give you a deed of a piece of property, which cost me over \$20,000.00 cash, for you to hold as security. If you should need the money sooner for some permanent investment I

will provide for payment of the check on short notice.

Yours truly,

R. T. ROOT.

Marked Defts. Exhibit #31. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [201]

**Defendant's Exhibit 32—Receipt, June 9, 1913,
Mackay to Root.**

HUGH MACKAY,
401 Exchange Building,
Denver, Colo.
P. O. Box 195.

		DENVER, COLO.,	191—
Sept. 2, 1911.	Dem. Loan Miller Est. 7%		\$500.00
	Int. on same to June 5th, 1913,	\$61.55	
" 5, "	Dem. loan M. Est. 7%		1550.00
	Int. on same to June 5, 1913,	189.88	
" 12, "	Dem. loan M. Est. 7%		500.00
	Int. on same to June 5, 1913,	60.58	
" 13, "	Dem. loan M. Est.		370.00
	Int. on same to June 5, 1913,	44.72	
" 18, "	Dem. loan Miller Est.		500.00
	Int. on same to June 5, 1913,	60.00	
Oct. 12, "	Dem. loan M. Est.		250.00
	Int. on same to June 5, 1913,	28.83	
Nov. 11, "	Dem. loan Miller Est.		550.00
	Int. on same to June 1, 1913,	60.32	
" 13, "	Dem. loan M. Est.		150.00
	Int. to June 1, 1913,	16.42	
" 14, "	Dem. loan Miller Est.		85.00
	Int. on same to June 5, 1913,	9.42	
			<hr/>
			4455.00 Pr.
		531.72	531.72
			<hr/>
			\$4986.72

June 9th, 1913.

Denver, Colo., June 9th, 1913.

Received from R. T. Root one check covering the amounts stated within; together with interest on same to June 5, 1913, and amounting to \$4986.72, with the understanding that Mr. Root will arrange for the payment of this check upon short notice, as provided in memorandum accompanying deed of Sept. 2, 1911, in this matter.

HUGH MACKAY, Es.

Defts. Exhibit #32. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [202]

**Defendant's Exhibit 33—Letter, April 18, 1914,
Mackay to Root.**

HUGH MACKAY,
#402 Exchange Building,
Denver, Colo.

P. O. Box 195.

DENVER, COLO., Apr. 18th, 1914.

Mr. R. T. Root,

Dear Sir:

I went up to Cheyenne, Wyo., and arranged to get \$2000.00 less the discount of \$125.00 for 30 days. The only way I could get the money was by selling to a Mr. Richardson 1/64 of the schooner Gov. Brooks and 2/64ths of the Wyoming, enrolled vessels at Bath, Me., the bills of sale of transfer of said interests to be recorded at Bath, Me., before I should

receive the money less the discount charged. In return I received an option granting me the right to purchase back said interests for the sum of \$2025.00 to be paid on or before May 10th, 1914, after that date option to be void.

This is a dangerous matter for me because if I fail to purchase by May 10, I lose my interests that are worth over \$7000.00. However, if you have to have the money, and that you can pay back \$2025.00 on or before May 10th, 1914, I will pay you \$1900.00 on or before Wednesday forenoon providing you agree that should you fail to pay the \$2025 on or before May 10th, 1914, you will upon demand thereafter pay me the sum of Seven Thousand Dollars (\$7000.00) the value of the interests which I should lose should you fail to pay the \$2025 on or before May 10th to enable my purchasing back said interests. If you agree to the proposition wire me direct saying I agree to proposition in your letter of Eighteenth, and the money will be paid, and unless you do I will not risk it.

Truly yours,

HUGH MACKAY.

Marked Defts. Exhibit #32. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [203]

**Defendant's Exhibit 34—Letter, July 21, 1913,
Mackay to Root.**

HUGH MACKAY,
401 Exchange Building.
Denver, Colo.

P. O. Box 195.

DENVER, COLO. JULY 21, 1913.

R. T. Root, Esqr.
Denver, Colo.

Dear Mr. Root:

Although I believe it unnecessary to write you at this time, yet I take the opportunity of advising you, that owing to my instructions by the County Court, and the pressing demands upon me as Executor, by the heirs of the Estate of George Miller, Dec., requiring that I immediately file a report, and pay pro rata to the heirs, the sum of \$10,000.00. I will be compelled to deposit in the First Nat. Bank of Denver to the credit of said Estate on Wednesday, July 30th, all checks given by you in payment of demand loans and payable at the Colo. Nat. Bank. The requirements upon me now owing to prolonged delays heretofore are imperative, and I must and shall act as above stated, unless I am requested by you to make the deposit mentioned at an earlier date than stated.

Respectfully Yours,

HUGH MACKAY,
Executor.

Marked Defts. Exhibit #34. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [204]

**Defendant's Exhibit 35—Letter, July 24, 1913,
Root to Mackay.**

R. T. Root,
Box 114, Denver, Colo.

Denver, Colo., July 24, 1913.

Mr. Hugh Mackay,
Denver, Colo.

Dear Mr. Mackay:

Yours of 21st inst. is received. I regret exceedingly I have not yet received the money to take up the checks which you refer to—but I shall try to get it by or before the date which you state in your letter you want it—and as you know I have arranged to start to California and expect to meet you there before the 30th inst., therefore I will not send the money to the Bank on which the checks were drawn, but as soon as I get it I will pay it over to you personally—and if I do not have it on that date I will get it just as quickly thereafter as possible and pay it to you—therefore please don't take the checks to the Bank referred to or to any other bank at all as I will pay the money to you direct and it will not be in the Bank at all.

If there was any mistake or error in the account for which the checks were given I will correct it, but as yet have not personally had time to look it over—

however this will not make any difference as I will pay the amount over to you as quickly as possible and if there are any errors we can correct them after. Trusting this arrangement for paying the money direct to you will be satisfactory, I am

Very truly Yours,

R. T. ROOT.

Marked Plffs. Exhibit "G" for identification. Marked Defts. Exhibit #35. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [205]

**Defendant's Exhibit 36—Letter, August 1, 1913,
Mackay to Root.**

HOLLENBECK HOTEL,

Los Angeles, Calif., Aug. 1, 1913.

Dear Mr. Root:

I shall leave this P. M. for Denver. I consider my presence there absolutely necessary within three days, on account of my replies to letters two weeks ago.

Any arrangement you wish to make please have it in shape by 4 P. M.

Truly Yours,

HUGH MACKAY.

Marked Defts. Exhibit #36. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co. [206]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY.

#E-6-PRESCOTT.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Petition for Appeal.

To the Honorable W. B. GILBERT, Judge of the
Circuit Court of Appeals.

The above-named, The Norma Mining Company, feeling aggrieved by the decree rendered and entered in the above-entitled cause, on the 18th day of March, 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record proceedings and documents, upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided; and your petitioner further prays that the proper order relating to the required security to be required of it, be made.

RICHARD E. SLOAN,

Solicitor and Counsel for Appellant.

[Endorsements]: In the District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. In Equity. E-6-Prescott. #E-23-Phoenix. Filed May 26, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Richard E. Sloan, Attorney. [207]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY #E-6-PRESCOTT.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Order Allowing Appeal.

On motion of Richard E. Sloan, Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Circuit, from the decree heretofore filed and entered herein, be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of Six Thousand Dollars, the same to act as a supersedeas bond, and also for a bond for

costs and damages on appeal said bond to be filed on or before June 15, 1916.

Dated May 23, 1916.

WM. B. GILBERT,
Judge of Circuit Court of Appeals.

[Endorsements]: In the District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. In Equity. #E-6-Prescott. E-33-Phoenix. Richard E. Sloan, Attorney. Filed May 26, 1916, at — M., Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [208]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. E-33 (PHX.)

HUGH MACKAY,

Plaintiff,

vs.

NORMA MINING CO.,

Defendant.

**Order Extending Time to July 1, 1916, to Give
Supersedeas Bond.**

IT IS ORDERED that the time of the defendant in the above-entitled cause to give a supersedeas bond be extended until July 1, 1916.

Dated June 14, 1916.

WM. B. GILBERT,
Circuit Judge. [209]

Order Extending Time to File Supersedeas Bond.
TELEGRAM.

A42GSMO 28 Govt

B Portland Ore 935AM June 30 1916.

Clerk United States District Court,
Phoenix, Az.

Time to file supersedeas bond in Mackay versus
Norma Mining Company is ordered extended ten
days.

WM. B. GILBERT,
U. S. Circuit Judge,
10:55 A. M. [210]

*In the District Court of the United States for the
District of Arizona.*

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Supersedeas Bond.

Know all men by these presents that we, The
Norma Mining Company, a corporation, as principal,
and W. E. Frost, Anson H. Smith, and G. T. Duncan
as sureties, are held and firmly bound unto Hugh
Mackay, the above named plaintiff, in the sum of
Six Thousand Dollars lawful money of the United
States, to be paid to him and unto his heirs, executors,
administrators, and assigns; to which payment well

and truly to be made we bind ourselves and each of us, our heirs, executors, administrators, and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 29th day of June 1916.

Whereas, the above named, The Norma Mining Company, has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the decree of the District Court for the District of Arizona in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above named, The Norma Mining Company, shall prosecute its said appeal to effect and shall answer all damages and costs if it fail to make its plea good, then this [211] obligation shall be void; otherwise to remain in full force and effect.

[Seal of the Norma Mining Co.]

THE NORMA MINING COMPANY.

By R. T. ROOT,
President.

W. E. FROST.

ANSON H. SMITH.

G. T. DUNCAN.

State of Arizona,

County of Mohave,—ss.

On the 6th day of July, 1916, personally appeared before me W. E. FROST, known to me to be the person described in and duly executed the foregoing instrument a party thereto, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth.

And the said W. E. FROST, being by me duly sworn, says that he is a resident and householder of the said County of Mohave, State of Arizona, and that he is worth the sum of *\$6000.00 Six Thousand Dollars (\$6000.00) over and above his just debts and legal liability and property exempt from execution.

*(Notation at side of page:) Figures changed from \$3000.00 to \$6000.00 before acknowledgment.

I. J. Whitney.

(Signed) W. E. FROST.

Subscribed and sworn to before me this 6th day of July, 1916.

[Seal]

I. J. WHITNEY,
Notary Public.

State of Arizona,
County of Mohave,—ss.

On the 6th day of July, 1916, personally appeared before me, ANSON H. SMITH, known to me to be the person described in and duly executed the foregoing instrument a party thereto, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth.

And the said ANSON H. SMITH, being by me duly sworn, says that he is a resident and householder of the said County of Mohave and that he is worth the sum of \$1000.00 over and above his just debts and legal liability and property exempt from execution.

ANSON H. SMITH.

Subscribed and sworn to before me this 6th day of July, 1916.

I. J. WHITNEY,
Notary Public. [212]

State of Arizona,
County of Mohave,—ss.

On the 14th day of July, 1916, personally appeared before me G. T. DUNCAN, known to me to be the person described in and duly executed the foregoing instrument a party thereto, and acknowledged that he executed the same as his free act and deed for the purpose therein set forth.

And the said G. T. Duncan, being by me duly sworn, says that he is a resident and householder of the said County of Mohave and that he is worth the sum of \$6,000.00 over and above his just debts and legal liability and property exempt from execution.

G. T. DUNCAN,

Subscribed and sworn to before me this 14th day of July, 1916.

[Seal]

I. J. WHITNEY,
Notary Public.

My Com. exp. Feb. 21, 1920.

State of Arizona,
County of Mohave,—ss.

On the — day of —, 1916, personally appeared before me —, known to me to be the person described in and duly executed the foregoing instrument a party thereto, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth.

And the said — being by me duly sworn, says that he is a resident and householder of the said

County of _____, and that he is worth the sum of \$_____, over and above his just debts and legal liability and property exempt from execution.

Subscribed and sworn to before me this ____ day of _____, 1916.

_____,
Notary Public.

State of _____,
County of _____, —ss.

On the ____ day of _____, 1916, personally appeared before me _____, known to me to be the person described in and duly executed the foregoing instrument a party thereto, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth.

And the said _____ being by me duly sworn, says that he is a resident and householder of the said County of _____, and that he is worth the sum of \$_____, over and above his just debts and legal liability and property exempt from execution.

Subscribed and sworn to before me this ____ day of _____, 1916.

_____,
Notary Public.

The foregoing bond is approved this 20th day of July, 1916.

WM. B. GILBERT,
Circuit Judge. [213]

(Endorsements on back of cover of Supersedeas Bond:)

In the District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. Supersedeas Bond. Filed Jul. 24, 1916. Mose Drachman, Clerk. By Ethel A. Webb, Deputy. Richard E. Sloan, Attorney. [214]

Order Extending Time to File Record and Docket Cause to November 11, 1916.

TELEGRAM.

A34PGSMO 35 Collect Govt

Po San Francisco Calif 405PM Oct 30 1916
Clerk US District Court,
Phoenix, Az.

Order signed by Gilbert Circuit Judge and filed extending time to file record and docket cause Mackay versus Norma Mining Company to and including November eleventh.

MONCKTON,
Clerk.

Filed Oct. 31, 1916. Mose Drachman, Clerk. By E. R. L. Webb, Deputy. [215]

*In the United States District Court for the District
of Arizona.*

No. E-33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing two hundred fifteen (215) typewritten pages, numbered from one (1) to two hundred fifteen (215), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the decree of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on be-

half of the plaintiff for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

[216]

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record —600 folios at 30¢ per folio	\$180.00
Certificate of Clerk to typewritten transcript of record, 4 folios at 30¢ per folio	1.20
Seal to said Certificate40
	<hr/>
	\$181.60

I hereby certify that the above cost for preparing and certifying record, amounting to one hundred eighty-one and 60/100 (\$181.60) dollars, has been paid to me by Richard E. Sloan, Esquire, one of counsel for the defendant herein.

I further certify that I hereto attach and herewith transmit the original citation in this cause.

WITNESS my hand and the Seal of said court, affixed this 9th day of November, A. D. 1916, at Phoenix, Arizona.

[Seal]

MOSE DRACHMAN,
Clerk.

By R. E. L. Webb,
Deputy Clerk. [217]

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Citation on Appeal.

The United States of America,—ss.

To Hugh Mackay, Plaintiff, Greeting.

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States for the Ninth Circuit, to be held at the City of San Francisco, State of California, on the first Monday of October, 1916, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Arizona, from a final decree signed, filed and entered on the 18th day of March, 1916, in that certain suit, being in equity No. E. 33-Phoenix, wherein you are plaintiff and The Norma Mining Company is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM B. GILBERT, Judge of the United States Circuit Court of

Appeals for the Ninth Circuit, this 20th day of July, 1916.

WM. B. GILBERT,
Judge of the Circuit Court of Appeals, for the Ninth
Circuit. [218]

[Endorsed]: In the United States Circuit Court of Appeals in and for the Ninth Circuit. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. Citation on Appeal. Received Service of Copy July 24, 1916, A. C. Baker. Filed Jul. 24, 1916, at — M. Mose Drachman, Clerk. By Ethel A. Webb, Deputy. [219]

[Endorsed]: No. 2876. United States Circuit Court of Appeals for the Ninth Circuit. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed November 13, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

**Plaintiff's Exhibit "K" for Identification—Check,
March 18, 1914, Wells County Abstract & In-
vestment Co. to Mackay.**

The Weld County Abstract
& Investment Co.

FIRST NATIONAL BANK. NO. 59.

Greeley, Colorado, March 18th, 1914.

Pay to the order of HUGH MACKAY, EXEC-
UTOR \$105.00 ONE HUNDRED FIVE and NO/100
DOLLARS.

THE WELD COUNTY ABSTRACT & IN-
VESTMENT CO.,

By W. P. ALLENPREST.

NOT OVER ONE HUNDRED TWENTY \$120\$.

(Endorsements on back of ~~note~~ check.)

Pay to R. T. ROOT,

HUGH MACKAY, Executor.

R. T. ROOT,

By H. M. ROOT.

23-56

Pay to the order of

DENVER NATIONAL BANK

All prior endorsements guaranteed

APR. 10, 1914.

THE GERMAN AMERICAN TRUST CO.

2

Denver, Colo.

2

6

Pay ANY BANK OR BANKER

or order

All Prior endorsements guaranteed

APR. 01, 1914.

DENVER NATIONAL BANK

23-7

Denver, Colo.

23-7

EDW. S. IRICH, Cashier.

(Notation.)

Marked Plff. Exhibit "K" for identification. Admitted and filed Aug. 25, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. E-6-Prescott. Hugh Mackay vs. Norma Mining Co.

[Endorsed]: Case No. 2876. U. S. Circuit Court of Appeals for the Ninth Circuit. Copy of Plaintiff's Exhibit "K," for Ident. Filed _____. Recd. Nov. 13, 1916. F. D. Monckton, Clerk.

Telegraphic Application and Order Extending Time to File Record and Docket Cause to and Including November 11, 1916.

Received at Post Office Building, 7th and Mission
Sts.

63SF WD 43GOVT

PHOENIX ARIZ 340POCT 30 1916.

HON WM B GILBERT

CIRCUIT JUDGE SAN FRANCISCO CALIF.

Owing to unusual amount work necessitated by present session court impossible file transcript of record case Hugh Mckay vs Nolma Mining Company by November first therefore request wire Ten days extension

Clerk U. S. District Court

303P

*United States Circuit Court of Appeals for the
Ninth Circuit.*

NORMA MINING COMPANY,

Appellant,

vs.

HUGH MACKAY,

Appellee.

Upon telegraphic application of the clerk of the United States District Court for the District of Arizona, and good cause therefor appearing, it is hereby ORDERED that the time of the appellant to file the transcript of record and docket the above-entitled cause in this court be, and hereby is extended to and including November 11, 1916.

WM. B. GILBERT.

United States Circuit Judge.

Dated San Francisco, Cal., Oct. 30, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. The Norma Mining Company vs. Hugh Mackay. Telegraphic Application and Order Extending Time to File Record and Docket Cause to and Including Nov. 11, 1916. Filed Oct. 30, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

THE NORMA MINING COMPANY,

Appellant,

vs.

HUGH MACKAY,

Appellee,

State of Arizona,

County of Maricopa,—ss.

Affidavit of R. T. Root.

R. T. Root, being first duly sworn, deposes and says; That he is president of the Norma Mining Company, the appellant in the above-entitled cause, and was such at all the times hereinafter mentioned. That the only assets of said Company consist of the property described and set forth in the decree entered in the above-entitled court on the 18th day of March, 1916, and some personal property situate on the mining claims therein described. That said property is situate in a remote part of Mohave County, Arizona, about thirty miles from the nearest railroad station. That said property has not been worked or operated for several years last past. That the costs and expenses incident to the above-entitled suit has been borne by affiant and one or two other stockholders of said company. That the affiant and the other stockholders and the officers of the company have used their utmost efforts to raise the money needed to prosecute the appeal in said cause to the Circuit Court of Appeals, but owing to

the condition of the company's finances and of the company's property and the judgment against the same in said cause, and on account of the financial condition of the affiant and the other stockholders of the company, he was unable to raise the money needed to perfect the appeal until recently. That the officers of the company expected to receive assistance in raising the necessary funds to prosecute the appeal from the principal stockholder of the company, the only one who was financially able to render much assistance, but owing to illness said stockholder was unable to render such assistance, so that affiant was compelled to rely largely upon his own efforts and own resources which are limited.

Affiant further states that this appeal has been and is being prosecuted by the appellant in the utmost good faith and as rapidly as the means of the company will permit; that the abstract of the evidence has now been prepared and the precipe filed with the clerk of the court.

R. T. ROOT.

Subscribed and sworn to before me this 27th day of September, 1916.

[Seal]

E. G. SCOTT,
Notary Public.

My commission expires June 7, 1920.

[Endorsed]: In the United States Circuit Court of Appeals in and for the Ninth Circuit. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee, Affidavit. Filed Oct. 2, 1916. F. D. Monckton, Clerk.

*In the United States District Court for the District
of Arizona.*

THE NORMA MINING COMPANY,

Appellant,

vs.

HUGH MACKAY,

Appellee.

Order.

Good cause appearing therefor it is hereby ordered that the appellant have until the 1st day of November, 1916, within which to perfect its appeal and to file or cause to be filed the transcript on appeal in the Circuit Court of Appeals for the Ninth Circuit.

WM. B. GILBERT,

Judge of the Circuit Court of Appeals, for the Ninth
Circuit.

[Endorsed]: In the United States District Court for the District of Arizona. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee. Order. Filed Oct. 2, 1916. F. D. Monckton, Clerk.

No. 2876. United States Circuit Court of Appeals for the Ninth Circuit. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee. Orders Under Rule 16 Extending Time to File Record. Refiled Nov. 13, 1916. F. D. Monckton, Clerk.

*In the District Court of the United States for the
District of Arizona.*

2876.

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from decree made by the United States District Court for the District of Arizona, on the 18th day of March, 1916.

I.

That the United States District Court, for the District of Arizona, erred upon the trial of said cause in admitting evidence for the plaintiff over the objection of the defendant as follows:

Under the pleadings, one of the issues was as to whether or not the defendant made, executed and delivered the mortgage deeds, bearing date the 2d day of August, 1913, and the 31st day of March, 1914, which said mortgages are referred to in the plaintiff's first and second cause of action, and which were sought to be foreclosed therein, it being claimed by the defendant in its answer that if said mortgage deeds were ever made, executed or delivered to the

plaintiff, such making, execution and delivery was unauthorized by the defendant company and without its knowledge or consent and without the knowledge or authority of the Board of Directors of the defendant company. In support of its said answer to plaintiff's complaint as to the making, execution and delivery of said mortgages, the defendant put in evidence the minute-book of the corporation, which shows that the Board of Directors of the defendant company at no time ever authorized the making, execution or delivery of said mortgages, or either of them, and that no action was taken by said corporation at any meeting of said Board of Directors authorizing or acquiescing in any way in such making, execution or delivery of said mortgages, or either of them. Whereupon, the defendant, in rebuttal of said testimony, called as a witness one, Frederick W. Lowry, who testified that he was a director of the defendant company at the dates of said mortgage deeds, and had prior thereto been a director of said company from the time of its organization, to wit, since 1907. That some time during the month of July, 1913, there was a meeting of the Board of Directors of the defendant company in the office of the witness, in the City of Denver, State of Colorado, at which said meeting a resolution was adopted authorizing a mortgage or mortgages to be issued to the plaintiff in any sum up to the extent of \$25,000, and reciting that the consideration that the company was to receive was to be the cancellation of certain indebtedness of the company to Mr. R. T. Root, President of the company, in an equal amount for whatever the

mortgages were issued, and that plaintiff, as Secretary of the corporation, afterward had the minutes of said meeting typewritten in his office and a carbon copy thereof afterward put in the minute-book of the company in the office of said R. T. Root, but that the witness did not have the directors sign these minutes at the time, and was not sure whether they were ever signed.

To the introduction of this testimony the counsel for the defendant objected upon the ground that the evidence was incompetent, immaterial and irrelevant, for the reason that the minute-book and records of the company were the best evidence of the action of the Board of Directors of the company, and in the absence of mistake or fraud in the entry of the minutes, were conclusive, and no mistake or fraud was ever alleged in the pleadings or shown by the evidence as a basis for the introduction of said proof, which said objections were by the Court overruled and an exception then and there taken to said ruling by defendant.

II.

That the said District Court, upon the trial of said action, erred in the admission of evidence as follows: Upon the conclusion of plaintiff's rebuttal testimony, the Court made an order continuing the case to the 18th day of October, 1915, for the purpose, among other things, of permitting the defendant to produce the testimony of Walter W. Root, a director of the defendant company, relative to the alleged meeting of the Board of Directors in July, 1913, and to rebut the testimony of the witness Lowry as to the fact

of said meeting, and the adoption of a resolution authorizing the making, execution and delivery of the mortgages sued upon, and with the distinct understanding and agreement between the parties and under the order of the Court, that said testimony should be limited to matters relating to the said meeting of said Board of Directors; that at said adjourned hearing said Walter W. Root was produced as a witness and interrogated by said defendant as to said meeting, and that upon the cross-examination of said witness, counsel for the plaintiff asked the witness whether or not it was his signature that appeared upon one of the mortgages sued upon, as Secretary of the Company. Whereupon counsel for the defendant objected to such question upon the ground that the question did not relate to said meeting of Board of Directors in July, 1913, and was, therefore, not a matter which, under the stipulation and agreement as to the continuance of said cause, and the order of the Court, might be inquired into. Whereupon, the Court overruled said objection and permitted and directed the witness to answer said question, which answer was, that it was his signature upon said mortgage; to which said ruling of the Court, counsel for the defendant then and there excepted.

III.

That the District Court erred in finding and decreeing that the notes and mortgages sued upon, or any of them, were valid obligations of the defendant company, for the reason that it is admitted by the pleadings that the said notes and mortgages were

executed and delivered by R. T. Root, President of the defendant company, provisionally and for the sole purpose of enabling the plaintiff to borrow money thereon. And the proof in the case wholly fails to show that then, or at any time thereafter, the defendant company ever received anything of value for or on account thereof, or that at any time it became bound by any of the terms and conditions of said notes and mortgages, or any or either of them, by any act or thing done by it.

IV.

That the said District Court erred in rendering its decree finding that the notes and mortgages sued upon were for a valuable consideration, executed and delivered to the plaintiff, and that there was due and owing by the defendant company to plaintiff any sum or sums whatsoever thereon, and in ordering the foreclosure of said mortgages, for the reason that the proof does not sustain such findings and decree, in this, that the proof does not show there was any consideration paid or in any way passed between plaintiff and defendant for the making, execution or delivery of said notes or mortgages, or either of them, and the said notes and mortgages were, therefore, *ultra vires*, and void.

V.

That the said District Court erred in rendering its decree finding that the notes and mortgages sued upon were executed and delivered to the plaintiff by the defendant company and that there was due and owing by the defendant company to plaintiff

any sum or sums whatsoever thereon, and in ordering the foreclosure of said mortgages for the reason that the proof does not sustain such findings and decree, in the respect that it shows that the making, execution and delivery of said notes and mortgages were unauthorized by the defendant company and without its knowledge or consent, and, therefore, by reason of the want of such authority, said notes and mortgages were never, and are not now, valid obligations of the defendant company.

VI.

That the said District Court erred in finding that the mortgages sued upon were made, executed and delivered by the defendant or were authorized by the defendant company, in this, that the minute-book of the company put in evidence, shows that said mortgages, or either of them, were not authorized by the defendant company, and were not made, executed and delivered with the knowledge and consent of said company, and there was no legal evidence introduced to vary or contradict the record of said company in that behalf; the only evidence proffered and introduced by the plaintiff upon the trial being the oral testimony of the witness, Frederick W. Lowry, and of the plaintiff, Hugh Mackay, that a meeting of the Board of Directors of said Mining Company was held in July, 1913; the oral testimony of said Lowry that a resolution authorizing the issue of mortgages by the defendant company to an amount or amounts not exceeding \$25,000.00, to R. T. Root, President of the company, in liquidation and settlement of certain alleged indebtedness due and owing from the

defendant company to said Root, was adopted at said meeting, and that the minutes of the said meeting were not signed by any director or directors of the company, but that only a carbon copy of the draft of the minutes of said meeting was placed in the minute-book of the company; the testimony of one, Miss Saunders, that she recollected having seen certain of the directors of the company go into the office occupied by said Lowry about the time of the alleged meeting and thereafter having copied at the request of said Lowry a pencil memorandum of some kind made by said Lowry; and the further testimony of Elmer Sykes, an employee of the witness Lowry, that he recollected seeing Mr. R. T. Root and Mr. Hugh Mackay, go into the office occupied by said Lowry about the time of the alleged meeting of the Board of Directors; all of which testimony relating to the holding of said meeting being contradicted by the testimony of R. T. Root and Walter W. Root, directors of the defendant company, and by the records and minutes of said company showing the resignation of said Lowry as a director and Secretary of said company long prior to said alleged meeting.

VII.

That the said United States District Court erred in sustaining the objection upon the trial of the case to the 5th, 6th, and 13th interrogatory and the answers thereto, appearing in the deposition of Mrs. A. S. Root, a witness for the defendant, as follows: The said District Court, upon the application of defendant, after the cause had been partially tried, continued the case for the purpose of permitting, among

other things, the taking of the deposition of said witness. At the time when said continuance was had, the Court stated that he would permit the examination of said witness in rebuttal of the testimony of witnesses for the plaintiff as to certain conversations between said witnesses and Mrs. A. S. Root, relative to the execution and delivery of the notes and mortgages sued upon and as to an alleged meeting of the Board of Directors of the defendant company in July, 1913. The Court further ordered that the plaintiff might produce at said adjourned hearing, witnesses who should be examined solely as to said alleged meeting of said Board of Directors and that only witnesses who were present at said meeting and the witness, Miss Saunders, should be produced and examined in behalf of plaintiff; that thereafter interrogatories were filed for the taking of the deposition of said witness, Mrs. A. S. Root, to which said interrogatories no objection was made by the plaintiff and no cross-interrogatories filed by plaintiff, and the deposition of said witness was taken upon said interrogatories; that when said deposition was produced by the defendant and read, the interrogatory No. 5, which reads as follows, "State whether you ever had any knowledge or information of the execution of either or any mortgage of the Norma Mining Company property," and the answer thereto which reads, "No, I did not," and the further interrogatory No. 6 which reads, "Please state what interest, if any, you had in the Norma Mining Company," and the answer thereto which reads, "I have

all the interest except three (3) shares"; and the further interrogatory number 13 which reads, "Was the company indebted to your husband, Mr. R. T. Root, in any amount," and the answer thereto which reads, "No," were each of them objected to by counsel for plaintiff upon the sole ground that said interrogatories and the answers thereto did not relate to the alleged meeting of the Board of Directors of the defendant company in July, 1913, and to the alleged conversations between said witness, Mrs. Root and certain witnesses for the plaintiff in accordance with the order of the Court, permitting the taking of the deposition, which said objection was by the Court sustained and the said interrogatories and the answers thereto were ordered stricken from the deposition, to which said ruling counsel for the defendant then and there excepted. That said interrogatories and answers thereto and each of them were material and relevant to the issues in the case; that said order of said Court continuing said cause for an adjourned hearing was departed from and not adhered to on the motion of plaintiff and testimony other than that which said order by its terms allowed to be taken was introduced and heard by the Court, the testimony of one Elmer Sykes having been taken at said adjourned meeting, said witness not being one of those included in said order.

VIII.

That the said United States District Court erred in finding that there was due and owing on the note, dated August 2d, 1913, the sum of Eighteen Thousand Four Hundred Thirty-four and 66/100

(\$18,434.66) Dollars, for the reason that it was admitted by plaintiff that said note and the accompanying mortgage were executed and delivered by R. T. Root, then President of the defendant company, for the purpose of enabling plaintiff to borrow money thereon, and that if, as claimed by plaintiff, it was thereafter agreed that said note and mortgage should be held by plaintiff as security for an indebtedness of said R. T. Root, plaintiff, and admitting as claimed by plaintiff that the defendant company authorized the execution and delivery of said note and mortgage, still the proof shows that said indebtedness of said R. T. Root, plaintiff, aggregated about Ten Thousand and no/100 (\$10,000.00) Dollars, and no more, and no judgment therefor should have been rendered on said note and mortgage in excess of said sum of Ten Thousand and no/100 (\$10,000.00) Dollars, with interest thereon.

IX.

That the said United States District Court erred in finding that there was due and owing on the note and mortgage deed dated March 31st, 1914, Four Thousand Five Hundred Twenty-three and 43/100 (\$4,523.43) Dollars, for the reason that the proof shows that said note and mortgage were executed and delivered to plaintiff by R. T. Root, President of the defendant company for the purpose of enabling plaintiff to borrow money thereon, and that at the time of said execution and delivery, the defendant company was not indebted to plaintiff in any sum or sums whatsoever, and that thereafter the only con-

sideration received by said R. T. Root from plaintiff for said note and mortgage was the sum of Eighteen Hundred and no/100 (\$1800.00) Dollars, and that if the defendant company ever authorized the execution and delivery of said note and mortgage or ever became obligated to pay the same, there was not due and owing on said note and mortgage, at the time of the entry of the decree, any sum in excess of Eighteen Hundred and no/100 (\$1800.00) Dollars and interest on same.

X.

That the District Court erred in rendering its decree, for the reason that it is not sustained by the evidence in the case, but is contrary thereto.

XI.

That the said District Court erred in its decree ordering a deficiency judgment against the defendant company, for the reason that the evidence does not show any right to such deficiency judgment and does not show that there is any indebtedness due and owing from the defendant company to the plaintiff.

WHEREFORE, appellant prays that said decree be reversed and the said District Court for the District of Arizona be ordered to enter a decree reversing the lower court in said cause.

RICHARD E. SLOAN,

Solicitor and Atty. for Defendant.

[Endorsements]: In the District Court of the United States for the District of Arizona. Hugh Mackay, Plaintiff, vs. The Norma Mining Company, Defendant. Assignment of Errors. Filed May 26,

1916, at — M, Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Richard E. Sloan, Attorney.

*In the United States District Court for the District
of Arizona.*

No. E-33 (PHX).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

**Certificate of Clerk U. S. District Court to
Assignment of Errors.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing eleven typewritten pages, numbered from 1 to 11 inclusive, to be a full, true, correct and complete copy of the Assignment of Errors filed by the defendant in the above and foregoing entitled cause, with the petition for appeal and the order allowing the appeal in the above-entitled cause on the 26th day of May, 1916, as the same remains of record on file in the office of the Clerk of said District Court, and that the same constitutes a part of the record on appeal from the said United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that said Assignment of Errors was inadvertently omitted from the copy of the record in said cause heretofore certified to and transmitted by me to the said United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs for the preparation and certification of the typewritten transcript of said Assignment of Errors, amounting to Nine Dollars and Forty Cents (\$9.40), has been paid to me by Richard E. Sloan, Esq., one of counsel for defendant herein.

WITNESS my hand and Seal of said Court, affixed this 10th day of January, A. D. 1917, at Phoenix, Arizona.

[Seal]

MOSE DRACHMAN,

Clerk.

By R. E. L. Webb,

Deputy Clerk.

[Endorsed]: No. 2876. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of Assignment of Errors. Filed Jan. 13, 1917. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2876.

THE NORMA MINING COMPANY,

Appellant,

vs.

HUGH MACKAY,

Appellee.

**Stipulation for Correction of Printed Transcript of
Record.**

It is hereby stipulated and agreed by and between Mr. Richard E. Sloan, attorney for Appellant, and Messrs, Baker & Baker and Messrs. Robinson & Robinson, attorneys for appellee, that the printed Transcript of Record herein, on page 30, may be corrected to show that R. T. Root was called for and by the defendant instead of the plaintiff, and that the same may be corrected by striking out the word "plaintiff" and inserting the word "defendant" in the 15th and 16th lines of said page, and, second, that said Record, on page 74, be corrected so as to show that the deal mentioned on said page did go through instead of as it now appears, "did not go through," by striking out the word "not" in the 13th line of said page 74.

RICHARD E. SLOAN,

Attorney for Appellant.

BAKER & BAKER,

ROBINSON & ROBINSON,

Attorneys for Appellee.

[Endorsed]: No. 2876. United States Circuit Court of Appeals for the Ninth Circuit. The Norma Mining Company, Appellant, vs. Hugh Mackay, Appellee. Stipulation for Correction of Printed Transcript of Record. Filed Feb. 19, 1917. F. D. Monckton, Clerk.

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY.

No. E-33 (PHX.).

Transferred to Phoenix by Agreement of Parties.

HUGH MACKAY,

Complainant,

vs.

THE NORMA MINING COMPANY,

Defendant.

Reply.

Comes now Hugh Mackay, complainant in the above cause, and replying to the amended answer and alleged counterclaim of The Norma Mining Company, defendant herein, says:

That saving and reserving all manner of exceptions to the uncertainties, imperfections and insufficiencies of the said amended answer and alleged counterclaim:

FIRST.

1. Denies that the notes and mortgages referred to in the complainant's bill of complaint, and in defendant's amended answer and alleged counter-

claim, were given to complainant for the accommodation of the said R. T. Root, or for the accommodation of any other person or corporation.

2. Denies that the said promissory notes or either of them, or the said mortgages or either of them, were executed or delivered by the defendant on the condition and understanding alleged in defendant's amended answer and alleged counterclaim, but alleges that they and each of them were delivered by the defendant to the plaintiff absolutely and without condition.

3. Denies that the said notes or either, or the said mortgages or either, were executed and delivered without the knowledge or authority of the directors and stockholders of the defendant company, and denies that said defendant received no consideration therefor.

4. Denies that the recitals of authority, or any other recitals in said mortgage, were or are contrary, as alleged in said amended answer and alleged counterclaim, to the real facts.

5. Denies that said R. T. Root, or the defendant company, or anyone in behalf of either of them, have ever offered to pay or have paid the sum of \$1800.00, or any other sum, upon either of said mortgages or the promissory notes secured thereby or for the return thereof, as alleged in said counterclaim, or at all.

6. That as to all the other matters stated and set forth in said amended answer and counterclaim, this complainant alleges that the same are eviden-

tial, immaterial and insufficient, and for that reason denies the same and each and every part thereof.

SECOND.

For further reply to defendant's amended answer and alleged counterclaim, this complainant says:

1. That the said promissory notes described and referred to in the complainant's bill, together with the mortgages therein set out and described, were executed and delivered to the complainant by said defendant for a good and valuable consideration, and that they were so executed and delivered by the authority and with the consent of all the stockholders and all of the directors of the defendant company, and with full knowledge on the part of such stockholders and directors as to the consideration therefor, and that since the execution and delivery of said notes and mortgages, the said stockholders and directors have at all times prior to the commencement of this action, fully acquiesced in the execution and delivery of said notes and mortgages to this complainant, making no objection thereto until after the commencement of this action; and further, that all recitals contained in said promissory notes and mortgages are true.

2. That relying upon the said authority, consent, knowledge and acquiescence of all of said stockholders and directors, as to the promissory note and mortgage referred to in complainant's first cause of action set out in his said bill, and relying upon the representations of the defendant, its stockholders, officers and directors, with respect to the validity of such promissory note and mortgage, plaintiff was

induced to advance the money represented by the promissory notes set out and described in the second cause of action in complainant's bill, and relying upon the representations of the defendant, its officers, directors and stockholders that said promissory notes and mortgages described in complainant's bill herein were valid and binding obligations of the defendant, and would be paid in full by the defendant, complainant after the maturity of said promissory notes and mortgages, refrained from bringing suit to foreclose said mortgages until the commencement of this action, such delay in bringing this suit being at the request of said corporation, by and through its proper officer or officers.

WHEREFORE: Complainant prays that the said alleged counterclaim be dismissed and that the complainant have relief as prayed for in his original bill.

HUGH MACKAY,

Complainant.

A. C. BAKER,

A. B. BAKER,

Solicitors for Complainant.

317-318 Fleming Building, Phoenix,
Arizona.

State of Colorado,

City and County of Denver,—ss.

Personally appeared before me the undersigned, a notary public in and for said City, County and State, Hugh Mackay, who being first duly sworn on oath says, that he is the complainant in the above-entitled case and has read the above and foregoing reply to the amended answer and counterclaim of

said The Norma Mining Company, defendant in said above-entitled case, and knows the contents thereof; that said reply is true.

Witness my hand and notarial seal this 30th day of March, 1915.

My commission expires March 20, 1919.

[Notary Seal]

GENEVIEVE GEGG,
Notary Public.

*In the District Court of the United States for the
District of Arizona.*

No. E-33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

**Certificate of Clerk of United States District Court
to Omissions From Record on Appeal.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing three typewritten pages, numbered from one to three, inclusive, to be a full, true, correct and complete copy of the plaintiff's reply to the amended answer of the defendant in the above-entitled cause filed by the plaintiff in the above and foregoing entitled cause, as the same remains of record on file in the office of the Clerk of said District Court, and that the same con-

stitutes a part of the record on appeal from the said United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the said plaintiff's reply was inadvertently omitted from the copy of the record in said cause heretofore certified to and transmitted by me to the said United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs for the preparation and certification of the typewritten transcript of said plaintiff's reply, amounting to Three and 10/100 Dollars, has been paid to me by Alexander B. Baker, one of the counsel for the defendant herein.

WITNESS my hand and seal of said Court affixed this 17th day of February, A. D. 1917, at Phoenix, Arizona.

[Seal]

MOSE DRACHMAN,

Clerk.

By R. E. L. Webb,

Deputy Clerk.

[Endorsed]: No. 2876. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of "Reply." Filed Feb. 19, 1917. F. D. Monckton, Clerk.

**Copy of Plaintiff's Exhibit "W," for Identification,
page 151.**

Copy on typewriter.

One carbon copy.

NORMA MINING CO.

Minutes of Special Stockholders' Meeting.

A special meeting of the stockholders of The Norma Mining Co., was held in Denver, Colo., July —, 1913, by consent; notice waived, all shares being present.

The following resolution was adopted by unanimous vote:

Whereas: The Norma Mining Co. owes R. T. Root the sum of more than \$25,000, for moneys advanced and expended upon its White Hills, Arizona, property, and desires to secure and pay the same;

Resolved: That the officers of the Co. be and they are hereby authorized to issue and deliver to Hugh MacKay, at the request and for the account of R. T. Root, the note or notes of the Co. up to an aggregate of \$25,000, and to secure the same by mortgage or mortgages upon all of the mines and property of the Co. at White Hills, Mohave County, Arizona; that such notes and mortgages shall be of such dates and form and contain such terms and conditions as said R. T. Root and said MacKay may hereafter agree upon, and that said notes and mortgages, when executed, shall apply and be credited upon the indebtedness of the Co. to said Root, and said indebted-

ness cancelled to the extent of such notes and mortgages.

On motion, adjourned.

F. W. LOWERY, Secy.

DIRECTORS' MEETING.

Immediately on adjournment of stockholders' meeting, the directors of The Norma Mining Co. met; notice being waived. Present, R. T. Root, F. W. Lowery and W. W. Root.

The resolution adopted at stockholders' meeting authorizing notes and mortgages of Co. to Hugh MacKay up to \$25,000, as set out in above minutes, was read; whereupon, on motion and unanimous ballot, said stockholders' resolution was adopted as a resolution of the board of directors. Adjourned.

F. W. LOWERY, Secy.

_____,
_____,
_____.

Directors.

*In the District Court of the United States for the
District of Arizona.*

No. E-33 (PHX.).

HUGH MACKAY,

Plaintiff,

vs.

THE NORMA MINING COMPANY,

Defendant.

**Certificate of Clerk United States District Court to
Omissions from Record on Appeal.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing two typewritten pages, numbered 1 and 2, to be a full, true, correct and complete copy of Plaintiff's Exhibit "W" admitted in evidence by the above-entitled court at the trial of the above-entitled cause and filed among the papers of said cause, as the same remains of record on file in the office of the Clerk of said District Court, and that the same constitutes a part of the record on appeal from the said United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the said Plaintiff's Exhibit "W" was inadvertently omitted from the copy of the record in said cause heretofore certified to and transmitted by me to the said United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs for the preparation and certification of the typewritten transcript of said Plaintiff's Exhibit "W," amounting to One and 90/100 (\$1.90) Dollars, has been paid to me by Alexander B. Baker, one of the counsel for the defendant herein.

WITNESS my hand and seal of said Court affixed this 17th day of February, A. D. 1917, at Phoenix, Arizona.

[Seal]

MOSE DRACHMAN,
Clerk.

By R. E. L. Webb,
Deputy Clerk.

[Endorsed]: No. 2876. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of Plaintiff's Exhibit "W" for Identification, Page 151. Filed Feb. 19, 1917. F. D. Monckton, Clerk.

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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Norma Mining Company,	}
<i>Appellant,</i>	
vs.	
Hugh Mackay,	}
<i>Appellee.</i>	

BRIEF ON BEHALF OF APPELLANT

RICHARD E. SLOAN,
Attorney for Appellant.



United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Norma Mining Company,		
		<i>Appellant,</i>

vs.

Hugh Mackay,		
		<i>Appellee.</i>

BRIEF ON BEHALF OF APPELLANT

This is an appeal from a decree entered in the District Court of the United States for the District of Arizona, in a suit brought by Hugh Mackay, appellee, vs. The Norma Mining Company, appellant, to foreclose two mortgages, one given to secure a note for \$16,000.00 and another given to secure two promissory notes, one in the sum of \$3,500.00 and another in the sum of ~~\$~~1,500.00, both mortgages covering a group of forty-six patented mining claims situate in the Indian Secret Mining District, Mohave County, Arizona, and the notes and mortgages purporting to have been executed by The Norma Mining Company to Hugh Mackay, the first bearing

date August 2, 1913, and the second bearing date March 31, 1914. From the decree entered in favor of Hugh Mackay foreclosing the said mortgages, the Norma Mining Company has brought this appeal.

STATEMENT OF FACTS

The appellant, the Norma Mining Company, is a corporation organized under the laws of the State of Arizona. It acquired the group of mining claims hereinbefore referred to by purchase in 1905. At the time of the transaction that lead to the execution of the mortgages sued upon, R. T. Root was President of the Company, and his son W. W. Root was Secretary of the Company; each of them held one share of the capital stock of the Company. The wife of R. T. Root, Mrs. A. F. Root, owned in her own name at the time nearly all of the stock of the Company, in fact all but sufficient of the stock to qualify three directors. For many years prior to August, 1913, R. T. Root and Hugh Mackay, the appellee, had had various financial transactions involving the loan of money from one to the other, at times Mackay appears to have been indebted to Root and at other times Root appears to have been indebted to Mackay. On the 2d of September, 1911, Root gave a deed to Mackay to land in Colorado. At the time of the giving of this deed, Root was not indebted to Mackay as they had prior thereto had a complete settlement between them. At the time he gave the deed, Root also gave Mackay a check for \$4,500. (Tr. pp. 66-69.)

Afterward at various dates Root obtained various sums of money from Mackay for which he gave his checks. In August, 1913, these checks approximated the sum of \$10,000.00 The deed to the Colorado land Mackay held as security for these checks.

In July, 1913, Mackay found it necessary to raise \$10,000 to make settlement of an estate of which he was executor. He applied to Root to raise him this money. (Tr. pp. 50-51), (also Defendant's Exhibit 34, p. 224.)

Root suggested as a method of raising money that Mackay should undertake to place a mortgage on the property of the Norma Mining Company, of which he was President. Acting upon this suggestion he executed the mortgage for \$16,000 as the President of the Norma Mining Company on the mining property of the company on the 2d day of August, 1913. It was agreed that Mackay was to find some one who would take over the note and mortgage for \$16,000 and from the proceeds to retain \$10,000 represented by the Root checks, and to pay the balance over to Root, for what purpose does not appear.

At the time of the execution of the note and mortgage of August 2, 1913, Mackay gave Root a receipt which reads as follows:

"Received from R. T. Root a note for \$16,000 of this date due to my order in 4 months, and a mortgage on 46 patented mining claims in White Hills, Mohave Co., Arizona, executed to me to secure said note, and both

the note and the mortgage are executed by the Norma Mining Company (an Arizona corporation), and said Root informs me that the said 46 mining claims stand in the name of said company on the records of said county.

I have recvd this mortgage and note for the purpose of selling them, and if sold pay for the proceeds recvd from their checks aggregating about \$10,000.00 held by me as executor of the George Miller Estate, which said checks are signed by said Root, and after paying said checks the net balance recvd for said note and mortgage is to be turned over to said Root by me. Said Root says he is now negotiating for a loan upon said property. If he makes a loan he is to make a mortgage on said property and notify said Mackay and if Mackay has not sold said note and mortgage first referred to herein, he is to return same to me, or if said Mackay fails to sell said note and mortgage within one month from date he is to return them to me and the said mortgage first herein referred to is not to be recorded unless sold by said Mackay or his assistants. Said note and mortgage was first made for \$20,000.00, but afterwards and before I received them they were changed to \$16,000.00 in lieu thereof. (Signed) Hugh Mackay."

In the mortgage there appears this recital; "This instrument is hereby executed and delivered by R. T. Root as President, by order of the Board of Directors of this company and said execution and delivery is duly

ratified by a meeting of the stockholders of the company at which all shares of stock issued was represented and unanimously voted in favor thereof.”

One of the issues raised by the answer of the appellant was whether in fact the mortgages were authorized by the stockholders of the Norma Mining Company or by its Board of Directors. The appellant denied that either its stockholders or its Board of Directors ever gave their assent to the execution of the notes and mortgages, or any of them while the appellee asserts the contrary. The minutes of the corporation did not disclose any action taken either by the stockholders or by the directors in relation to the matter. On the trial Mackay testified that he was present in Denver, Colorado, at a meeting of the stockholders and Board of Directors of the Norma Mining Company held on the 19th day of July, 1913, at which a resolution authorizing the execution of a note and mortgage up to the amount of \$25,000 in favor of himself was adopted. (Tr. p. 52.) One, Frederick W. Lowry, who at one time was the secretary of Root, but who was as he testified employed by Mackay in 1913, testified that as a director of the Norma Mining Company he attended a meeting in Denver on said date at which Mr. R. T. Root and W. W. Root and Hugh Mackay were present, and that he dictated a resolution authorizing the execution of a note and mortgage or notes and mortgages, by the Norma Mining Company to Hugh Mackay, in amounts up to

\$25,000; that the resolution so prepared by him was adopted but that the same was not dated or signed by any of the directors nor was, so far as he knew, any minutes of said meeting taken and recorded, but that a type-written copy of the resolution so prepared by him but undated and unsigned as aforesaid, was left by him and placed as a loose sheet in the minute book of the company. (Tr. pp. 100-105.)

One, Elmer Sykes, testified to having seen Root, Mackay and Lowry in the office of Mr. Lowry about the time of the alleged meeting. The stenographer employed by Lowry at the time, a Miss Saunders, also testified that Mr. Lowry gave her a copy of a resolution about the time of the alleged meeting and that she wrote the same on her typewriter, and that she saw Mr. Root, Mr. Mackay and Mr. Lowry go into the office of the latter about the same time but that she was not present and did not know what occurred therein.

On the other hand, Mr. R. T. Root testified that no such meeting was held at any such time or place and no such resolution adopted by the stockholders or by the Board of Directors. (Tr. pp. 38-40.) Mr. W. W. Root, Secretary of the Company, also so testified. (Tr. pp. 146-147.) In the same behalf it was shown that Mr. Lowry's written resignation as director of the company had been filed as early as 1911. Mr. R. T. Root testified that this resignation was accepted on July 15, 1911, and H. M. Root appointed in his stead. (Tr. p. 31.)

The minutes of the Board of Directors confirm this testimony.

Hugh Mackay, appellant, testified that a day or two before the 19th of July, 1913, R. T. Root had suggested the giving of the note and mortgage and that he stated to him that "it would be all right" because the Norma Mining Company was indebted to him in the sum of about \$30,000. (Tr. pp. 51-52.) R. T. Root testified that the Norma Mining Company was not indebted to him at the time and denied having so stated. (Tr. pp. 37-38.) There was no attempt to prove this indebtedness by any record of the company. Lowry stated that there had been such a record but no effort was made to produce it or have it produced. He stated the indebtedness was for money expended by Root on the property of the company. Root testified that the money so expended by him was money belonging to his wife, who was the principal stockholder of the company. (Tr. pp. 37-38.)

It appears that Mackay made some effort to dispose of the \$16,000 note and mortgage but failed to find anyone to take them. On March 31, 1914, another mortgage was executed by R. T. Root as President of the Norma Mining Company and attested by W. W. Root, Secretary, and delivered to Mackay as security for two promissory notes, one in the sum of \$3,500 and the other in the sum of \$1,500, both purporting to be the notes of the company payable on or before May

1, 1914. The latter mortgage covered the same group of 46 mining claims situate in Mohave County, Arizona, described in the mortgage for \$16,000.00. In the second mortgage there was this recital: "The execution of this mortgage was duly authorized by a meeting of the stockholders of said, the Norma Mining Company, at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a resolution authorizing the execution and delivery hereof, and was authorized by resolution of its Board of Directors duly adopted by unanimous vote at a meeting at which all the directors of said company were present."

The circumstances connected with the giving of the latter mortgage appears to have been as follows: Mr. Mackay was unable to dispose of the \$15,000 mortgage so upon the suggestion of Root, the smaller mortgage was made out and Mackay undertook to dispose of it for \$4,000, or if he so desired to take it for himself in the sum of \$4,000. After its execution Mackay gave Root a check for \$1,810.00. Subsequently, as Mackay testified, he advanced certain moneys and paid certain expenses of certain trips made for the benefit of Root which brought the amount up to \$4,000.

It was admitted in evidence that the Norma Mining Company did not receive any money whatsoever, either from Mr. Root or Mr. Mackay, or any one else, in any of the transactions connected with the execution of

the notes and mortgages or thereafter. What money passed between Mackay and Root related entirely to their individual affairs and had no connection whatever with the business of the company. Some time during the year 1914, Mackay placed both mortgages of record and thereafter brought this suit to foreclose the same.

SPECIFICATIONS OF ERROR

The appellant contends that the learned District Court erred in the following respects:

I.

In finding that the notes and mortgages sued upon were valid obligations of the Norma Mining Company when the proof fails to show that the appellant company at any time ever received anything of value for or on account thereof, and that the purpose for which said notes and mortgages were issued was a corporate purpose.

II.

In finding that the notes and mortgages sued upon were valid obligations of the Norma Mining Company when the proof fails to establish that the making, execution and delivery of the same were authorized by the appellant company.

III.

In rendering its decree finding that said notes and mortgages were valid obligations of the appellant company when the proof shows that they or either of them were not authorized by the appellant company and they or either of them were not made, executed and delivered for a corporate purpose and they or either of them were not made, executed and delivered for any consideration moving from the appellee thereof to the appellant company.

IV.

In finding that there was due and owing from the ap-

pellant company to the appellee on the \$16,000 note and mortgage the sum of \$18,434.66 when the proof shows that if said note and mortgage ever became a valid obligation of the appellant company, said obligation was for the sum of \$10,000 and no more.

V.

In finding that there was due and owing on the notes and mortgages dated March 31, 1913, the sum of \$4,523.43 when the proof shows that if said note and mortgage ever became a valid obligation of the appellant company the amount due thereon from said appellant company as shown by the evidence was the sum of \$1,810.00 and interest at 6 per cent from the date thereof.

VI.

In striking from the deposition of Mrs. A. F. Root, a witness for the appellant, the answer of said witness made in response to an interrogatory in that behalf denying that she had stated in the presence of witnesses for the appellee that she knew of the execution and delivery of the notes and mortgages sued upon at the time they were alleged to have been executed and delivered and of a meeting of the stockholders and Board of Directors of the Norma Mining Company on July 19, 1913.

VII.

In striking the answer of Mrs. A. F. Root made in the aforesaid deposition made to an interrogatory that

she was the owner of all the shares of stock of the Norma Mining Company except three shares.

VIII.

In striking the answer of said witness made in said deposition to an interrogatory that the Norma Mining Company was not indebted to R. T. Root in any amount at the time of the execution of said notes and mortgages.

POINT.

I.

The Court Erred in Finding That the Notes and Mortgages Sued Upon Were Valid Obligations Of the Appellant Company for the Following Reasons: First, Because the Proof Fails to Show That R. T. Root Was Authorized by the Company to Execute the Same, and Second, Because the Proof Fails to Show That Any Corporate Purpose Was Served Thereby Or That Any Consideration Was Received Therefor.

Upon the question as to whether the notes or mortgages were authorized by the appellant company, while admitting that the evidence is conflicting, appellant nevertheless contends that the appellee has failed by his proof to establish that fact. The only authorization claimed or attempted to be shown by the appellee was that alleged to have been given at a meeting of the stockholders and Board of Directors of the Norma Mining Company at the office of the witness Lowry in Denver on the 19th day of July, 1913. No other act of authorization was attempted to be shown. No reference or mention of any such meeting is found in the minute book of the company. The appellee Mackay testified that he attended such a meeting in the office of the witness Lowry and that the meeting was held at the suggestion of R. T. Root. (Tr. pp. 50-52.)

Frederick W. Lowry testified that he was at one time

the secretary of R. T. Root but that prior to July, 1913, he had ceased to be employed by Root and had entered the employ of appellee Mackay; that as a director of the Norma Mining Company he attended a meeting of the Board of Directors held in his office at Denver, the 19th day of July, 1913; that at the suggestion of Mr. Root he wrote out a form of resolution and record of the meeting for use in the minutes; that he dictated to his stenographer, a Miss Saunders, a form for this resolution and minutes of the meeting, who made a typewritten copy of the same; that this copy was left without date and without any signature and as a loose sheet of paper in the minute book of the company. He stated that the purported resolution authorized a mortgage or mortgages to be issued to Mr. Mackay in a sum of \$25,000 and that the consideration the company was to receive was the cancellation of an indebtedness from the company to Mr. Root for whatever amount the mortgages might be issued. He stated there was present at the meeting R. T. Root, W. W. Root, appellee McKay and himself. (Tr. pp. 100-103.)

One, Elmer Sykes, testified that he was associated with Lowry and occupied the same office with him in July, 1913; that on July 22d he saw Mr. R. T. Root, Mr. Mackay, Mr. Lowry and W. W. Root at the office of Mr. Lowry in Denver; and that there was a meeting held on that day and that during the meeting Mr. Lowry came out and handed Miss Saunders a paper to

typewrite, and that the paper thus handed to Miss Saunders was in Mr. Lowry's handwriting and purported to be the resolution and minutes referred to by Mr. Lowry. Upon cross-examination Sykes stated that he was positive the meeting was not on July 19th but on July 22d. He knew that for the reason that Lowry was out of the city on July 19th. (Tr. pp. 130-134.)

Miss Jessie Saunders testified that she was employed in Lowry's office in July, 1913, and identified a copy of a resolution and minutes which she stated she wrote for Mr. Lowry, and that on the day of the meeting she saw R. T. Root, W. W. Root, Hugh Mackay and Frederick W. Lowry at the office of the latter. (Tr. p. 120.) On the other hand, R. T. Root testified positively that no such meeting was held (Tr. pp. 39-40), as did also W. W. Root. (Tr. p. 147.)

If we were left to the testimony of the witnesses alone, the fact of such a meeting would be a matter of grave doubt, particularly when we consider that the records of the company show that Lowry in July, 1913, was not a director of the company, and that there was a sharp conflict between the witnesses for appellee as to the date of the meeting. But the mortgages themselves and letters put in evidence written by appellee after the alleged meeting point inevitably to the conclusion that no such meeting was held. In both mortgages it is recited that they were authorized by the stockholders and directors of the company. R. T. Root in his testimony stated

that when the first mortgage was executed there was the distinct understanding between him and Mackay that if the latter should find a purchaser for the note and mortgage there should then be a meeting called for the purpose of having the company authorize the execution of the same. (Td. p. 40). The fact that no date of such meeting was given in the recital of the mortgage and the place where any such meeting was held, was not given therein, sustains Root in this testimony. In addition to the recitals in the mortgages there is shown in evidence a letter written by Mackay to Root dated July 21, two days after Mackay and Lowry stated the meeting had been held and one day previous to the date when Sykes stated the meeting was held. See Defendant's Exhibit 34, (Tr. p. 224). In this letter Mackay is pressing Root to do something toward relieving him of his embarrassment with reference to the \$10,000 due the Miller estate. He could not possibly have written such a letter had there been a meeting of the Norma Mining Company and a note and mortgage authorized by said Company on that day for the purpose of doing that which he states in his letter he was urging Root to do. The same is true if a meeting had been arranged for and was to be held on July 22nd. If any such meeting had been held or contemplated, some mention or reference would certainly have been made therein. Then again, attention is called to Defendant's Exhibit 35, (Tr. p. 225) being the reply by Root to Mackay of

the latter's letter of July 21st, in which no reference is made to any such meeting or to any such plan of raising the money proposed at said meeting according to Mackay's testimony and agreed to by Root. The reading of the record is convincing that the giving of the notes and mortgages was not authorized by any act of the corporation and that the attempt to show this grew out of a necessity on the part of the appellee of establishing the validity of the notes and mortgages as against the corporation.

If, as we contend, there was no authorization given by the company for the execution of the notes or mortgages or either of them, then it must follow that they are not valid obligations of the defendant company.

It cannot be contended successfully that a President of a company may bind the company by a transfer of its assets either as security or otherwise unless authorized so to do, or unless after such transfer, his act be ratified by the company.

Again if any such authorization as claimed was given by the company before the company can be bound by the notes and mortgages sued upon, Mackay not being an innocent purchaser the transaction must appear to have been for a corporate purpose and based upon a good consideration.

A corporation may not be held liable as a mere accommodation maker of notes and mortgages when executed for a purpose other than for which it was organized.

2 Cook on Corporations (4th Ed.) p. 1754.
Hutchinson vs. Sutter Mfg. Co. 57 Fed. 998
National Park Bank vs. German-American M.
W. Co. 116 N. Y. 281 s. c. 22 N. E. 367.
Hall vs. Turnpike Co. 27, Cal. 255.

It is likewise well settled that no officer of the company, even if he should control practically all of the stock of the company, may deed or mortgage the assets of the company for other than a corporate purpose.

2 Cook on Stock and Stockholders (3d Ed.) Sec. 708,

Humphreys vs. McKissock, 140 U. S. 304,
Fitzgerald vs. N. P. Ry. Co., 45 Fed. 812.
A. T. & S. F. Ry. Co. vs. Cochran, 23 Pac. 155,
Bank of Monroe vs. Gifford, 32 N. W. 669,
Gulf Etc. Ry. Co., vs. Morris, 4 S. W. 156,
Hopkins vs. Roseclan L. Co. 72 Ill. 373.

Then again the proof wholly fails to show that the company received any consideration for the execution of the notes and mortgages or either of them. The appellee attempted to show such a consideration by attempting to show that The Norma Mining Company was indebted to R. T. Root and that the consideration received for the notes and mortgages was the discharge of this indebtedness. There is, however, no sufficient proof that any such indebtedness existed. The records of the company did not show any such indebtedness. R. T. Root testified that the company was not indebted to him in 1913. Mrs. Root in her deposition also stated that there was no such indebtedness. To be sure, this

answer was stricken by the Court upon the ground that it was not rebuttal testimony and therefore not admissible. We think the Court was in error in this ruling and we shall argue hereafter that this Honorable Court should consider the evidence as properly in the record.

The witness Lowry stated that the records of the company at one time showed it was indebted to Root, and that this indebtedness was for money expended by Root on the property prior to 1912. Root stated in explanation of this, that he expended money on the property some years prior to 1912; that the property was bought by Mrs. Root in 1905 and then transferred to the company; that the money he expended on the property was money furnished by her and was not money of his own and that he had never made any claim to be reimbursed by the company for any such outlay. (Tr. p. p 37-38). If the company was in fact indebted to Root it must have been for a debt of long standing and one that was incurred years before the execution of the notes and mortgages. It seems remarkable that the records of the company should not disclose such an indebtedness or some claim upon the part of Root when we consider that the Statute of Limitations in this State bars such a claim within three years.

The appellee Mackay, in a letter written to Root in 1914, shown in the record as Defendant's Exhibit 28, (Tr. p. 218) speaks of the property of the Norma Mining Company as being free from any lien and inferentially

from any claim whatsoever. The date of this letter is August 27, 1914. As shown by the letter, he still held the mortgage under the original agreement for the purpose of placing the same for the benefit of himself and Root. If any indebtedness was due Root from the Company, that indebtedness must have existed at the date of this letter, for the company up to that time had paid nothing on the note and received nothing from Root.

The trial court could not have had all the facts in mind in rendering his decree else he could not have possibly reached the conclusion that the Norma Mining Company received any consideration for the execution of the notes and mortgages upon the theory that an indebtedness due Root was discharged thereby in whole or in part.

If there was no indebtedness discharged by the giving of the notes and mortgages, then it follows that they could not and did not become valid obligations of the company.

Germania Safety Co. vs. Boynton, 71 Fed. 797,
Central Trust Co., vs. C. H. V. & T. Ry. Co., 87
Fed. 815.

POINT.

II.

The Court Erred in Rendering Any Decree Finding That Either the Notes or Mortgages Sued Upon Were Valid Obligations of the Appellant Company.

In order to sustain the decree the proof must show, first, that the execution of the notes and mortgages sued upon were authorized by the appellant company and second, that the company received some consideration therefor.

Neither one of these facts was clearly proven at the trial. The evidence tending to show authorization of the notes and mortgages is as we contend clearly insufficient to establish that fact. The slight evidence introduced by appellee tending to show an indebtedness due from the Norma Mining Company to Root in 1913, was overcome by the positive statements of Root that there was no such indebtedness and by his uncontradicted statement that the money that may have been paid out under his direction on the company's property was not his own but the money of Mrs. A. F. Root, his wife, and by the fact that no company record was shown or attempted to be shown showing any such indebtedness.

The indebtedness testified to by Lowry, if it was ever incurred, was incurred prior to 1912, before the execution of the notes and mortgages. The Statute of Limitations in Arizona bars debts of this sort in three years. If there was any such indebtedness recognized by the

company or by Root, it seems remarkable that it should have existed for years without some record having been made of it or some claim having been presented or some effort made to keep it alive. An inspection of the record will make it evident that the matter of indebtedness due from the company to Root was an afterthought on the part of appellee to give seeming validity to the notes and mortgages.

POINT.

III.

The Court Erred in Finding That There Was Due Under the Notes \$18,523.43 On the First Mortgage And the Sum of \$4,523.43 On the Second Mortgage Sued Upon.

The \$16,000 note and mortgage was executed August 2, 1913. Contemporaneously with the execution of the note and mortgage, a paper was signed by Hugh Mackay purporting to be a receipt for the note and mortgage in which it is recited that the mortgage and note were received for the purpose of selling them and from the proceeds paying an indebtedness of Root's of \$10,000 due Mackay as executor of an estate, and in which it is further recited that after the payment of the \$10,000, the balance of the proceeds of said note and mortgage was to be paid over to Root. Inasmuch as this suit is against the Norma Mining Company and the property to be foreclosed is the property of the Norma Mining Company, if, as recited in the mortgage, authority was given by the stockholders and directors of the company for the execution of the note and mortgage, such authorization must have been given in view of the conditions stated by Mackay in said paper, namely, that the indebtedness due Mackay to be taken care of by the note and mortgage was the \$10,000 named therein.

The statement is made by Mackay in the receipt (Tr. p. 192) that if the note and mortgage should be sold for

more than \$10,000 the balance was to be paid to Root, but as the note and mortgage was not so disposed of but retained by Mackay as security for the amount due him, that amount must be limited to the \$10,000. An examination of Mackay's testimony will disclose that at the time of the execution of the \$16,000 note and mortgage he computed the indebtedness due from Root at approximately \$10,000.00. It is true that his statements are very much involved in uncertainty, but sufficient appears to indicate that what Mackay had in mind at the time was some method by which he could raise the sum of \$10,000 to settle with the estate of which he was executor. Lowry, appellee's witness, so testified. (Tr. p. 101). This is manifest, not only by the receipt which has been referred to above, but by his letter to Root dated July 21, 1913, two days after the alleged meeting of the Norma Mining Company at Lowry's office, which letter is shown in the record as Defendant's Exhibit 34, and which conclusively shows that fact. (Tr. p. 224.) The letter written by Root dated July 24, 1913, in answer to Mackay's letter of July 21, 1913, shown in the record as Defendant's Exhibit 35, (Tr. p. 225) requests Mackay not to "take the checks to the bank" and states that he would pay the money to him direct and if there was any mistake or error in the account for which the checks were given, he would correct it. Mackay in his testimony attempted to show that the mortgage was given to secure a larger

sum, part of which he states was interest upon what he terms the Lowry Loan, (Tr. p. 72) (also Defendant's Exhibit 28, Tr. p. 218), which is irreconcilable with his letter and Root's reply as well as the receipt given by Mackay at the time of the execution of the note.

These two papers corroborate the testimony of Root to the effect that the mortgage of \$16,000 was made and delivered for the purpose of borrowing money on the same from some third person, the proceeds of which was to pay checks held by Mackay as executor to the amount of \$10,000 and the balance to be paid to Root. While possibly it may be that, had Root been the owner of the property mortgaged, upon the failure of Mackay to borrow the money thereon, he could then have held the same, not only as security for the \$10,000 in checks, but for other indebtedness due from Root, he certainly had no right to include other sums than that for which the note was executed and charge these additional sums against the property of the Norma Mining Company without its consent. Assuming that it did assent to the execution of the original note and mortgage, there is nothing in the record to show that such assent covered other transactions than those included in the mortgage at the time of its execution. In other words, Mackay cannot charge against the Norma Mining Company any indebtedness not secured by the mortgage itself and include such indebtedness in the mortgage lien. We

submit that it clearly appears in the record that even if it be assumed that the Norma Mining Company authorized the execution and delivery of the \$16,000 note and mortgage, having the power to give such authorization, that in such event the indebtedness secured by the mortgage did not extend beyond the \$10,000 due Mackay as the executor of the Miller Estate for which the mortgage was given, and that the decree should be modified to the extent of eliminating therefrom the difference between \$10,000 and \$16,000 and interest on said difference at 6 per cent from August 2, 1913, to the date of the rendition of the decree.

Again the amount obtained by Root under the second mortgage was the sum of \$1,810.00. (Tr. p. p. 60-63). The mortgage did not contain any provision covering future advances. As said above in relation to the \$16,000 mortgage, the second mortgage if authorized, can only secure the amount for which it was originally given. Mackay undertook to show that after the loaning of the \$1,810 on the second mortgage, Root became indebted to him in other sums for expenses of certain trips and certain small personal loans. (Tr. p. p. 60-63-188.) The reason for giving the mortgage for \$5,000 clearly appears as already shown was that Mackay should place the same with some third party for their mutual benefit. Appellant contends therefore that the decree should be further modified, in case the Court should be of the opinion that the notes and mortgages are valid obliga-

tions and enforceable against appellant, to the extent of eliminating the further sum of \$2,190 with interest thereon at the rate of 6 per cent per annum from March 31, 1914, to the date of the rendition of the judgment.

POINT.

IV.

The Court Erred in Striking Out From the Deposition of Mrs. A. F. Root Her Statements That She Did Not Know of the Execution of the Notes and Mortgages at the Time of the Execution and That At That Time the Company Was Not Indebted to Root in the Sum of \$30,000 Or Any Other Sum.

No question was raised as to the competency, relevancy or materiality of the interrogatories or that the answers were not properly responsive. The objection made to the answers was that they were not rebuttal testimony and a ruling of the Court in excluding the answers was based upon that objection. (Tr. p. 155).

The trial court was under the impression that the testimony of the witness on the subject of her knowledge of the execution of the mortgages on the Norma Mining Company's property and of her interest in the property and also of the indebtedness due the company from R. T. Root in 1913, were matters that should have been anticipated by the appellant so as to require it to introduce proof before resting its case. The fact was that the deposition of Mrs. Root was taken by leave of the court after the case had been partially tried. The record, however, does not disclose that in fact the appellant had rested its case when the adjournment was had for the taking of this and other depositions. No good reason, therefore, appears from the record for the exclusion

of the evidence upon the ground that it was not rebuttal. The case is analagous to that of one where the trial is continued for the production of additional evidence. The evidence as to her knowledge of the execution of the notes and mortgages was material, in view of the statement of Mackay that she had at or about the time of the execution of the \$16,000 mortgage, talked to him about it and evinced a knowledge of its execution, and her statement as to any indebtedness due Root from the Norma Mining Company at the time, in view of the statements of the witness Lowry, and also of the witness appellee Mackay was likewise material.

We think the Court erred in striking the answers of the witness from her deposition and in refusing to admit the same in evidence. While it may not have been reversible error, we think that this Honorable Court should disregard the ruling of the trial Court to the extent of considering the deposition and statements of the witness in its bearing upon the questions of fact to which the latter related.

POINT.

V.

**The Court Erred in Entering a Deficiency Judgment
Against Appellant.**

The only reason for entering a deficiency judgment in this case would be that the debt secured was that of appellant. It is clear upon any theory of the facts that the debts secured by the mortgages given were the personal debts of R. T. Root. There is, therefore, no basis for the deficiency judgment.

I respectfully submit that this decree should be reversed for the reasons given.

Respectfully submitted,

RICHARD E. SLOAN,

Attorney for Appellant.



No. 2876.

3

UNITED STATES
Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY,
Appellant,

vs.

HUGH MACKAY,

Appellee.

Upon Appeal from the United States District Court for
the District of Arizona.

BRIEF AND ARGUMENT OF APPELLEE.

BAKER & BAKER,
ROBINSON & ROBINSON,
Attorneys for Appellee.

UNITED STATES
Circuit Court of Appeals
For the Ninth Circuit

THE NORMA MINING COMPANY,
Appellant,

vs.

HUGH MACKAY,

Appellee.

No. 2876.

BRIEF AND ARGUMENT OF APPELLEE.

This is a suit to foreclose two mortgages upon the property of The Norma Mining Company, the appellant, an Arizona corporation, in Indian Secret Mining District in Mohave County, Arizona, given to Hugh Mackay, the appellee. The first mortgage was executed by The Norma Mining Company by R. T. Root, President, under the seal of the company, on the 2nd day of August, A. D. 1913, and was given to secure its promissory note of even date for Sixteen Thousand Dollars (\$16,000), payable four months after date with interest at six per cent per annum. The second mortgage was executed by The Norma Mining Company by R. T. Root, President, under the seal of the company, on the 31st day of March, A. D. 1914, attested

by W. W. Root, Secretary, and was given to secure the sum of Five Thousand Dollars (\$5,000), evidenced by two promissory notes of even date, one for Three Thousand Five Hundred Dollars (\$3,500), and the other for One Thousand Five Hundred Dollars (\$1,500), payable on or before May 1st, A. D. 1914 with interest at the rate of seven per cent per annum. The first mortgage recites:

“This instrument is hereby executed and delivered by R. T. Root as President, by order of the Board of Directors of this company, and said execution and delivery is duly ratified by a meeting of the stockholders of the company, at which all shares of stock issued was represented and unanimously voted in favor thereof.” (p. 168).

The second mortgage contains the following recitals:

“the execution of this mortgage was duly authorized by a meeting of the stockholders of said The Norma Mining Company, at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a Resolution authorizing the execution and delivery hereof, and was also authorized by a Resolution of its Board of Directors, duly adopted by unanimous vote at a meeting at which all of the directors of said company were present,” (p. 174)

and

“there is a mortgage by aforesaid grantor to aforesaid grantee on said property for Sixteen Thousand Dollars (\$16,000) and some taxes, all of which the grantor will pay.” (p. 175).

The Bill of Complaint in separate causes of action alleges the execution and delivery of said notes and mort-

gages for a valuable consideration, and that default had been made in payment and prayed for judgment, and that the mortgages be foreclosed.

The appellant filed its Answer denying the execution or delivery of the promissory notes and mortgages in suit, denying that the President, at the time of the execution, was authorized, and if the said note was executed by the said The Norma Mining Company by R. T. Root, President, as alleged in the Complaint, said execution was wholly without its authority or consent and out of the course of its regular business and without consideration, and had never been ratified. After thus alleging, the Answer sets up that there had been personal loans between the appellee and R. T. Root, the then President of the appellant company; that at the time of the execution of the first mortgage the appellee was in need of money and requested the said Root to help him by giving him some notes or securities upon which he could raise money. Whereupon the said Root, without authority, as it is alleged, or knowledge of the Board of Directors of the appellant and without any consideration of any kind or nature whatsoever moving to the appellant, executed in the name of the corporation, and conditionally delivered said Sixteen Thousand Dollar (\$16,000) note and mortgage, and that as to the second mortgage and two notes aggregating Five Thousand Dollars (\$5,000), it alleges that said notes and mortgages were made by R. T. Root, its then President, upon personal matters and dealings between said Root and the appellee, and had no relation to any business or interest of the appellant and without any consideration moving to the appellant, and without its knowledge or authority, and were conditionally delivered to the appellee.

Although not required by Equity Rules (Rule 31) a Reply was filed. This Reply has not been made a part of

the Record here. It was in the nature of denial of the new or affirmative matter contained in the Answer. Upon the issue thus joined the case was tried. The trial was begun at Prescott, Arizona, in August, 1915, and concluded at Phoenix in January, 1916. A judgment and decree was entered in favor of the appellee foreclosing said mortgages.

The appellant, feeling aggrieved by this judgment and decree, has prayed an appeal to this court and assigned certain errors, which we will briefly discuss and endeavor to show that the court committed no error against the appellant in entering said judgment and decree.

I.

In regard to the first Assignment of Error, which Assignment presents the question of whether or not the Minute Book and records of the company are the best evidence and conclusive in absence of fraud or mistake as to the action of the Board of Directors, Prof. Wigmore's remarks in his work on evidence, Vol. II, Sec. 1346, are pertinent:

“There are innumerable cases in which a writing is regarded as the sole and exclusive object of proof because of the parole evidence or integration principle. This principle assumes that, by some provision of law, or by the parties' intent, the act effective in law is a single written memorial, and that no parole act is to be regarded as of any effect for the purpose. Where this is the situation, it is obvious that the terms of the writing are alone to be proved; the writing must be proved. Here it is clear that the writing is not ‘evidence,’ nor ‘conclusive evidence,’ of the act; for it is the act. That the writing cannot be shown to represent inaccurately some

prior parole conduct, is not because the writing is conclusive evidence of what that parole conduct was, but because the parole conduct is immaterial and ineffective, and therefore cannot be proved at all. It is not because we trust conclusively to the writing's testimony of what the parole conduct was, but because we do not care what the parole conduct was and are not allowed to ascertain.

“In consequence of this principle of integration, then, the question is constantly presented whether a specific writing has become the sole act material to the case; and this is purely a question of the substantive law applicable to the kind of transaction involved. * * * For example, whether a corporate record can be shown to be incorrect depends on whether by the substantive law a corporate doings, to be effective, must be done in writing.”

Prof. Wigmore on this subject later says in Section 2451:

“Whether the acts of a corporation must at common law be integrated in a written record is a question which has given rise to a great variety of opinions and of practice.”

Citing *Bank vs. Dandridge*, 12 Wheat., 64, 67, 69, decided in 1827, in which Judge Story says:

“In ancient times it was held that corporations aggregate could do nothing but by deed under their common seal. But the rule has been broken in upon in a vast variety of cases in modern times and cannot now, as a general proposition, be supported. We do not admit, as a general proposition, that the acts of a corpora-

tion, although in all other respects rightly transacted, are invalid merely from the omission to have them reduced to writing unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force."

Prof. Wigmore, in Sec. 2451, continues:

"Though the modern tendency is to apply no different rule to corporate than to natural persons. Whether the proceedings of a corporate meeting are subject to the same rule is a distinct question and the analogy of judicial records here makes for preserving the same compulsory rule but again the modern tendency is to leave the transaction without legal restriction."

In the footnote Prof. Wigmore cites cases beginning with 1824 which show the growth of this modern tendency until at present the rule appears to be

"that the action of a Board of Directors may be proved by parole."

In *Zalesky vs. Ia. Insurance Co.*, 102 Ia., 512, 70 N. W. 187, an offer was made to prove the action of a Board of Directors but was excluded on the ground that it was not the best evidence. The court in reversing the trial court says:

"It will be observed that no record was made of the action of the Board and there was no written evidence of the conclusion arrived at. It rested in the memory of individuals who were present and their recollection and statements as to what was done was the best and only evidence attainable. There is no statutory requirement that such matters should be in writing

and we know of no good reason for holding that parole evidence is not admissible in such cases. Indeed it has been so often held that where no records are kept or the proceedings are not recorded, parole evidence is admissible to show what was resolved upon and by what vote it was carried that it may be said to be the unanimous voice of authority that such proof may be given. The evidence offered was not only the best evidence of which the case was susceptible, but it was also competent to establish the facts sought to be proved.”

Teneick vs. R. R. Co., 41 N. W., 905, (Mich.); Kramm vs. The Proprietary Co., 12 Me., 354; Bank vs. Dandridge, 12 Wheat., 69, and numerous other authorities.

In Boggs vs. Lakeport, etc. Association, 111 Calif., 354, 43 Pac., 1106.

“While the records of the corporation are usually regarded as the best evidence of the action of the Board, yet upon an issue whether a Resolution was passed authorizing a given contract or conveyance, the fact may be proved by parole.”

It is stated in Vol. II, Thompson on Corporations, 2nd Edition, Sec. 1847:

“The doctrine is now almost universally recognized that parole evidence is admissible to prove the unrecorded acts and transactions of the corporate body or of its directors. This applies especially to third persons dealing with the corporation. The reason for the rule is obvious. The transactions are all within the circle of the corporation functions and the duty to record is devolved upon the corporation itself or

by some officers selected by it, and failure to perform a duty in this respect ought not to prejudice the rights of third persons dealing with the corporation. It necessarily follows that the acts of a corporation in the absence of record may be proved by the testimony of competent persons. And where no minutes are kept of the proceedings of a meeting, they may be proved by parole.”

In *Allis vs. Jones, et al.*, 45 Fed., 148:

“Upon an issue whether the execution of a mortgage by the President and Secretary of a corporation was authorized by its Board of Directors in whom the control and management of its affairs was vested, parole evidence is admissible to prove the action of the Board when the record of the meeting fails to state it.”

Judge Caldwell in deciding the case says:

“Parole evidence is admissible to prove the action of the Board of Directors or Stockholders where the record fails to state it.”

II.

The second and seventh Assignments of Error can best be considered under one head because in the final analysis they are controlled by the same legal principle. The second assignment of error is based solely upon the ground that a certain question propounded by counsel for appellee was not within the rule of the trial court granting a continuance of the case. The Record does not disclose clearly that the testimony of Mr. Walter W. Root was to be so limited as stated in appellant's second assignment of error. All that appears in the record on this question is to be found in the

statement of Mr. Stoneman of counsel, p. 116, in moving the continuance for a sufficient number of days to enable appellant to secure the presence of W. W. Root who would testify that there was no such meeting held. The trial court continued the hearing "to take the testimony of W. W. Root" and other witnesses (p. 118). As stated, it does not appear in the Record that the testimony was to be so limited but for the sake of argument, grant that to be the case. The question complained of was not propounded to prove the execution of the mortgage in question. Its execution was admitted by the President, R. T. Root (p. 41). The execution of these mortgages is also admitted in the pleadings (p. 14). The second mortgage and the one concerning which the question was propounded, contained the recital:

"The execution of this mortgage was duly authorized by a meeting of the stockholders of said The Norma Mining Company, at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a resolution authorizing the execution and delivery hereof, and was also authorized by a resolution of its Board of Directors duly adopted by unanimous vote at a meeting at which all of the directors of said Company were present."

This mortgage was signed by one W. W. Root as Secretary.

The purport of Mr. W. W. Root's testimony on direct examination was to show that there was no meeting of the Board of Directors of The Norma Mining Company authorizing the mortgages in question. The reason for asking on cross examination the question excepted to was to contradict the purport of such testimony by showing that Mr. Root himself had signed a deed in which he had said there was such meeting. This was clearly within any

limitation that the court put upon the examination of this witness at the time when the continuance was granted. At the conclusion of the Re-direct examination of the witness the Court interrogated him further along this line asking the witness if he read the mortgage when he signed it, etc. (pp. 150-1), thereby showing the interpretation the court himself put upon the order of continuance.

The record nowhere discloses the exact language of the alleged stipulation and agreement as to the continuance of the case or even the substance thereof in relation to this witness. It would be impossible for this court to determine whether or not the ruling of the trial court was contrary thereto unless the same was set up in full or the substance thereof fully given.

Relative to Assignment of Errors VII, the appellant contends that the trial court erred in sustaining the objection of appellee to interrogatories 5, 6, and 13, propounded to Mrs. Root. The ground of appellee's objection was that the same did not come within the rule of the court permitting the taking of the deposition. The trial court, when the application to take the deposition was made, very clearly stated upon what subjects he would permit the interrogatories to be propounded, as follows: (p. 117)

“I will permit them to take the interrogatories to confirm or deny the conversation to which the witness testified here but I cannot permit them to take the deposition with reference to the ownership of that stock.”

Having this before us a simple reading of the three interrogatories makes it clear that on the ground interposed by appellee they were all properly excluded. Interrogatory No. 5 reads as follows:

“State whether you ever had any knowledge or information of the execution of either or any

mortgage of The Norma Mining Company property.”

This in no manner, in no way, confirms or denies the conversation or conversations testified to.

Interrogatory No. 6 reads:

“Please state what interest, if any, you had in The Norma Mining Company.”

This likewise plainly neither confirms or denies any conversation and very nearly, if not actually, comes within the express inhibition that the Court would not permit the taking of the deposition with reference to the ownership of the stock.

Interrogatory No. 13 reads:

“Was the company indebted to your husband, Mr. R. T. Root, in any amount.”

This question relates to nothing that would confirm or deny the conversation.

Counsel for appellant admits that the interrogatories were not strictly within the rule because it does not touch the conversation. Mr. Stoneman stated:

“I agree with your Honor that it is not strictly within the rule because it does not touch the conversation.” (p. 153).

The appellant argues in addition that the interrogatories and answers thereto and each of them were material and relevant to the issues in the case. The Court granted the continuance to take the deposition upon the ground that appellant might have been surprised in regard to certain conversations testified to and permitted the interrogatories to confirm or deny such conversation. If every question that might be material or relevant to the issues in the case had been per-

mitted to be asked, it would have meant that the whole case would have been opened up. In fact the Court gave that very reason for limiting the interrogatories. The appellant further argues that this evidence should have been permitted because the Court had permitted the testimony of Mr. Elmer Sykes contending that the latter's testimony did not come within the rule. Appellee contends differently. The Court wished to hear the testimony of Miss Saunders and "any other person who was present at the meeting." (p. 118). Mr. Sykes clearly came within the rule.

Both Assignments of Error are based on the admission or rejection of evidence on the ground that the evidence was without the rule granting a continuance. We urge that the whole subject was a matter within the discretion of the trial court and not subject to review in an appellate court.

In the case of *Copper River Mining Co. vs. McClellan*, 138 Fed., 333-339, it is said:

"A continuance is not a matter of right but it rests in the sound discretion of the trial court whose ruling thereon is not subject to review in an appellate court unless there has been an abuse of discretion."

In *Yarde vs. Baltimore and O. R. Co.*, 57 Fed., 909-13, Judge Thayer says:

"The plaintiffs in error finally insist that the circuit court erred in overruling their motion for a continuance. There are two good and sufficient answers to this assignment.

"In the first place the record shows that no exception was taken to such a motion in the circuit court and in the second place a motion for a continuance is addressed to the sound discre-

tion of the trial court and its action overruling such a motion cannot be reviewed by a writ of error. This has long been the rule in the United States Supreme Court and the doctrine is binding upon this court."

Drexel vs. True, 74 Fed., 12-13, is to the same effect, Judge Caldwell in deciding the case says:

"It is assigned as error that the court refused to continue the case upon application filed by plaintiff in error. A continuance is not a matter of right but is a matter resting in the sound Judicial discretion of the lower court whose ruling thereon is not the subject of review."

In the light of these cases it seems that the granting or refusing of a continuance is a matter within the discretion of the trial court. It would also appear that the trial court could have refused to hear any further evidence at all after the case was closed at Prescott and such a ruling would not be the subject of review. Also the trial court could have continued the case for all purposes and such a ruling would not be a subject of review.

Now if the trial court could have refused to hear the evidence which appellant claims comes within the rule allowing a continuance by refusing to allow the motion for a continuance, and could also allow all material and relevant evidence to be admitted on a ruling continuing the case for all purposes, it would seem that any limitation on the evidence to be taken at a continued hearing was purely a matter of discretion, and not a proper subject for review. It was a self-imposed restriction, and the court's own rule and one which would be within the discretion of the trial court to interpret.

III.

Appellant's third, fourth, fifth and sixth Assignments of Error are so indissolubly linked together and dependent upon whether or not the mortgages and notes were authorized, and what consideration was authorized to be accepted for their execution and delivery, all of which was fully covered by the testimony in regard to the meeting of the Board of Directors and stockholders that it would seem well to consider these Assignments of Error under one heading.

Appellant declares in the sixth Assignment of Errors that the trial court erred in finding that the mortgages sued upon were made, executed and delivered by the appellant or were authorized by it in that the minute book put in evidence shows that said mortgages or either of them were not authorized by the company and were not made, executed and delivered with the knowledge and consent of said company. The truth is that the minute book, as introduced in evidence *now*, shows nothing about these mortgages. There is no record in the minute book, as introduced in evidence, of any meeting either of directors or stockholders authorizing their execution. As to whether or not evidence could be introduced to vary, add to or even contradict the record has been fully and conclusively covered under subdivision I of this brief.

Appellant declares in his sixth Assignment of Errors, that there was no legal evidence introduced to vary or contradict the record. We contend that there was a meeting of the stockholders followed immediately by a meeting of the Board of Directors, that minutes were prepared of these meetings in typewritten form and placed in the minute book. Upon the production of the minute book these minutes are found to be missing, and there is no record in the minute book of any such meetings. There being no record in the minute book of such meet-

ings, we offer parole evidence to prove that there were such meetings, what transpired at the meetings, and that minutes of the meetings were prepared and what the minutes were. From a reading of the Record in this case we are confidently of the opinion that the meetings of July, 1913, are abundantly proven.

(1) The mortgages themselves recite that they were properly authorized by a meeting of the directors, and a meeting of the stockholders (pp. 168 and 174).

(2) The appellee, Mr. Hugh Mackay, testifies that Mr. Root told him that Mr. Lowery was a director of the company (p. 51); that a meeting to authorize the execution of the mortgages up to Twenty-five Thousand Dollars (\$25,000) was held, and all of the shares of stock exhibited, Mr. Root declaring he owned every share of stock; that a Resolution authorizing the execution of the mortgages was voted on (p. 52); that a directors' meeting was held (p. 52); that there were present Mr. Walter Root, Mr. Lowery and Mr. R. T. Root (p. 52).

(3) Mr. F. W. Lowery, who has no interest in this case, likewise testifies as to the fact of the meetings, and who were present, and the place and time of holding the same (p. 101). He was a director, vice-president and secretary of the company (p. 102); that Mr. Root stated he owned all of the shares of the corporation outside of the directors' shares and produced the certificates (p. 103); he described all of the certificates (p. 105); that a resolution authorizing the mortgages was adopted by unanimous vote (p. 102). He further testifies that he prepared the minutes of the meeting at the time and while the meeting was in progress (p. 101). He produced the original manuscript draft of such minutes (p. 102). They were offered and introduced and read in evidence as plaintiff's Exhibit W (pp. 102 and 103).

(4) Miss Jessie Saunders, the stenographer, remembers distinctly the meeting, and positively who were present (p. 125). She recalls writing a paper for Mr. Lowery; remembers distinctly that it was written out in long hand for her to transcribe (p. 126):

“I made an exact copy of what Mr. Lowery handed me, and that was this that has been exhibited to me by Judge Baker, plaintiff’s Exhibit W.” (p. 124).

She gives reasons for remembering the meeting:

“I remember this one because of the fact of Mr. Lowery standing right beside my desk and mentioning the matter to Mr. Sykes why the meeting was being held.” (p. 125).

After writing the paper she gave it to Mr. Lowery. She made a carbon copy.

(5) Mr. Elmer Sykes is equally positive as to the holding of the meeting. He was not an employee of Mr. Lowery. The meeting was held in his office (p. 135). The doors were open (p. 135).

“There were present Mr. R. T. Root, Mr. Walter Root, Mr. Mackay, Mr. Lowery, myself and Miss Saunders.” (p. 131).

Saw Mr. Lowery hand Miss Saunders a paper to transcribe, and read the carbon copy (p 132); knows that plaintiff’s Exhibit W is the same as he remembers the paper written by Miss Saunders (p. 133). He was present in the suite of rooms where the meeting was held with the doors open, in a sense participated in the meeting by reading over the carbon copy of the minutes at the time it was written to see that it was all right, as was his custom with all such matters (p. 132).

(6) Dr. W. J. Geiermann, a disinterested witness of Altadena, California, testified that Mr. Root told him that a meeting of the Board of Directors had been held and a resolution passed authorizing such loan in order to avoid the possibility of any technical objection, although he did not consider it necessary because he owned all the stock (p. 115).

Mr. F. W. Lowery further testified that he examined the minute book introduced in evidence (Defendant's Exhibit No. 21), at different times subsequent to July, 1913. In September of that year he examined the minute book and the minutes of the July, 1913, meeting were in the book in typewritten form, loose leaf, not written in the minute book in manuscript (p. 100). About the middle of 1914 he also examined the minute book and there was no record in that book of minutes as they appear now from pages 15 to 17 (p. 99).

Mr. R. T. Root testified that he wrote those minutes. They were not written at the time the meetings were held, but a good while since (p. 35). He further testified that he held Mr. Lowery's resignation as director, to be accepted at any time (p. 42). Mr. Lowery testified that his resignation was signed and left undated in the minute book of the company from the time the company was first organized (p. 98). He further testified in response to interrogatory by the Court:

"My resignation as secretary or director of The Norma Mining Co., which I executed on the formation of the company, was never acted upon by the Board of Directors prior to July, 1913. I was never notified by any person that my resignation had been accepted up to this time (the time of trial). I was never notified of any such meeting." (pp. 109-10.)

The Articles of Incorporation which were read into the record in this case and which are copied at length in the minute book (Defendant's Exhibit No. 21), give to the Board of Directors authority to conduct the affairs of the corporation. This is the general law and the law of the State of Arizona, where the company was incorporated. It is conclusively proven in this case by the recitals in the instruments, by the testimony of the witnesses, by the draft of the minutes (Plaintiff's Exhibit W), that a meeting where all the stock was represented was held, and that the Board of Directors, having authority to transact the business of the company, met in July, 1913. What took place is equally clearly proven. The execution and delivery of these mortgages to Mackay were authorized in consideration of the cancellation of the indebtedness of the company to its President, R. T. Root, to the amount of the mortgages to be issued up to Twenty-five Thousand Dollars (\$25,000) (plaintiff's Exhibit W; also Mr. Lowery's testimony, pp. 101-2). This authority was given by Resolution unanimously adopted (p. 102). Appellee testified that Mr. Root stated at the meeting:

"The company owes me approximately Thirty Thousand Dollars (\$30,000). I don't know the exact figures, but Mr. Lowery there does;"

and

"Any mortgage that is issued for money for me or for my use to the extent of that amount, there is no one on earth that can find fault with it." (p. 52).

Mr. R. T. Root admits there was a record kept of the outlay and expenses he paid for the operation of The Norma Mining Co. (p. 37). Mr. Lowery testified that

there were charges against The Norma Mining Co. on account of operating. Any money that was expended was to be repaid. It was regarded at all times as an indebtedness to Mr. Root (p. 112). That when it became involved or there was a possibility of becoming involved, and it became necessary to figure what that indebtedness was, it aggregated Thirty Thousand Five Hundred and some odd dollars (p. 113).

Against this formidable array of evidence is the testimony of Mr. R. T. Root and W. W. Root, who signed the mortgages with the recitals therein as to the meetings. The former admits that he paid the development of the property in his own name, paid all expenses of operating, always has been general manager, procured the funds and paid the expenses in his individual name, kept a record of the expenses (p. 37), admits that he got the money from Mr. Mackay; that he has not paid anything on the notes or on the mortgages (p. 46); admits that Mr. Mackay had security for it. He had the mortgage as security (p. 46).

It cannot, therefore, be successfully contended that these mortgages were executed without authority, or that no consideration passed to the company for their execution. When these mortgages were executed in accordance with the Resolution, automatically the debt of the corporation to Mr. Root was cancelled to the amount thereof. The corporation having received a full consideration by the cancellation of its indebtedness to Mr. Root, unconditionally delivered the notes and mortgages to Mr. Mackay when they were executed. The arrangement as to the disposition of the mortgages after their execution was wholly a matter between Mr. Root and Mr. Mackay.

It appears that at the time of the meeting of July, 1913, Mr. Root was indebted to Mr. Mackay in a large amount, for which he held Mr. Root's checks on banks

where Root had not money to pay them (defendant's Exhibits Nos. 3 to 8, 17; and one for Seven Hundred and Fifty Dollars (\$750) not in evidence, but testified to). This indebtedness was largely from funds belonging to an estate. It was their desire to dispose of the mortgage or mortgages so that Mr. Mackay might be reimbursed. To that end they went to Los Angeles, California, and for some time tried to do this. Not being able to accomplish their purposes there, and knowing of a party who was in Denver that might take it, a mortgage was prepared on August 2, A. D. 1913, for Sixteen Thousand Dollars (\$16,000), and Mr. Mackay came to Denver but was unable to dispose of the mortgage. He returned to Los Angeles and on August 25, A. D. 1913, agreed with Mr. Root that he would take the mortgage himself, and thereupon delivered to Mr. Root his aforesaid checks (p. 87). This was an arrangement wholly between Mr. Root and Mr. Mackay.

IV.

With reference to Assignments Nos. VIII and IX, it is contended the judgment on the first mortgage should not have been in excess of Ten Thousand Dollars (\$10,000), and on the second mortgage in excess of One Thousand Eight Hundred Dollars (\$1,800) with interest thereon in each case. While it is clear that as between the appellant and the appellee, it having received a full consideration for its mortgages by the cancellation, *pro tanto*, of its indebtedness to Mr. Root, and while counsel for the appellant did not desire an accounting between Mr. Root and Mr. Mackay (see statement of Mr. Aldrich, counsel for appellant, p. 32), the appellee was prepared at the time of trial and showed conclusively that even as between himself and Mr. Root the full cash face value of the mortgages were paid by appellee to Mr. Root. This

was very clearly proven by the testimony of the appellee and the incontrovertible exhibits filed. For convenience of the court and counsel, we will tabulate the exhibits and show the correctness of the amounts:

FIRST AS TO THE \$16,000 NOTE.

Defendant's Exhibit 3, June 9, 1913, check of R. T. Root, payable to Hugh Mackay.....\$ 1,543.76

Defendant's Exhibit 4, June 9, 1913, check of R. T. Root to Hugh Mackay..... 4,986.72

Defendant's Exhibit 5, May 29, 1913, check of R. T. Root, payable to Hugh Mackay..... 416.81

Defendant's Exhibit 6, May 23, 1913, check of R. T. Root, payable to Hugh Mackay..... 500.00

Defendant's Exhibit 7, May 29, 1913, check of R. T. Root, payable to Hugh Mackay..... 1,288.89

Defendant's Exhibit 8, June 11, 1913, check of R. T. Root, payable to Hugh Mackay..... 300.00

\$ 9,036.18

In addition to the foregoing checks, there was Defendant's Exhibit 17, mentioned in Defendant's Exhibit 16 (pp. 202-203), June 19, 1913, check of R. T. Root, payable to Hugh Mackay\$ 1,000.00

Appellee testifies at pp. 56 and 57 and elsewhere (pp. 79 and 80) that he held Mr. Root's check for money given to Mr. Root and payable to Mr. Mackay, dated May 29, 1913, for..... 750.00

Appellee also testifies that he gave Mr. Root on July 24 (p. 57, also p. 71)..... 100.00

Charged as cash (pp. 57 and 70)..... 250.00

Appellee testifies he gave Mr. Root credit for two years' interest on another loan of \$14,000, due from Mr. Root, evidenced by receipt (pp. 57 and 75), amounting to..... 1,680.00

The interest was calculated on checks from their dates to August 2, 1913, the date of the mortgage, \$120.63, and on a note of \$3,250, from April 22, 1913, to August 2, 1913, \$63.19 (pp. 57, 80 and 81) 183.82

\$13,000.00

Appellee testified that Mr. Root owed him \$2,568.40 on notes, plaintiff's Exhibits T and U (pp. 189 and 190), secured by bonds, which bonds Mr. Root obtained from him to sell to pay the amount, and upon which bonds Mr. Root received the money but failed to pay (pp. 57, 72 and 73). (Plaintiff's Exhibit V.) As the notes were not there to be surrendered, appellee gave a due bill (Defendant's Exhibit 19) for 3,000.00

\$16,000.00

All of said checks were drawn by Mr. Root on banks wherein he had not money to meet them, and were surrendered by appellee to Mr. Root August 25, 1913, when appellee took the Sixteen Thousand Dollar (\$16,000) note and mortgage and gave the Three Thousand Dollar (\$3,000) due bill.

The appellee testified (p. 75) that this Three Thousand Dollar (\$3,000) due bill was paid by crediting the \$2,568.40 and interest, represented by the notes above mentioned and paying the balance in cash by giving Mr. Root two or three checks and telling Mr. Root what had been done and to which Mr. Root assented (p. 85).

SECOND, AS TO THE \$5,000 NOTE.

The appellee testified as shown (at pp. 59, 60, 61 and 62), that about March 2, 1914, Mr. Root telegraphed his

son, Herbert, requesting appellee to go to New York; that he went there and found Mr. Root and his son, Walter at the McAlpin Hotel, in bad shape for money, with hotel bills and different things; that Mr. Root had a deal on to get a large sum of money but required at least Four Thousand Dollars (\$4,000) (pp. 59 and 60). The plan of Mr. Root was to make a new mortgage on this Arizona property for a larger amount, provided it could be placed with someone and pay off the Sixteen Thousand Dollar (\$16,000) mortgage and have some left for himself. Such loan could not be procured and finally an effort was made to place a second mortgage for the sum of Five Thousand Dollars (\$5,000), but nothing could be done although offering a discount of One Thousand Dollars (\$1,000). After waiting nearly a month, appellee got ready to start for Denver. He told Mr. Root that he might try to sell this second mortgage in Denver or raise money some way if he could. The mortgage and notes (plaintiff's Exhibits C, D and E) were prepared (p. 60) for Five Thousand Dollars (\$5,000) and executed by The Norma Mining Company by Mr. R. T. Root, president, attest by his son, W. W. Root. Appellee was authorized to sell said mortgage and notes for Four Thousand Dollars (\$4,000) or take it for Four Thousand Dollars (\$4,000), either thing, notwithstanding that said notes and the receipt therefor (defendant's Exhibit 2, p. 193) are for Five Thousand Dollars (\$5,000). Appellee came to Denver. Mr. Root's son, Walter, followed him. (p. 60). Came to appellee in Denver and told him that they had made checks on The German-American Trust Company for One Thousand Eight Hundred Dollars (\$1,800) and had no money, and that if these checks were not paid they would be ruined. Appellee could not get anyone in Denver to buy the second mortgage, so decided to take it himself and procured for the son a check to meet the checks on The German-American

Trust Company and paid the balance shortly thereafter, as appears by the following table of exhibits:

Plaintiff's Exhibit H, check, 4-6-1914, Robinson & Robinson, endorsed: "Pay to the order of W. W. Root, Hugh Mackay (p. 180) ..\$	1,810.00
Plaintiff's Exhibit I, check April 8, 1914, Hugh Mackay to W. W. Root (p. 181)	80.00
Plaintiff's Exhibit J, check April 9, 1914, Hugh Mackay to W. W. Root (p. 182)	150.00
Plaintiff's Exhibit K, check March 18, 1914, Wells County Abstract & Investment Co. to Hugh Mackay, by him endorsed to R. T. Root (p. 240)	105.00
Plaintiff's Exhibit P, check April 21, 1914, Hugh Mackay to W. W. Root (p. 187)	7.00
Plaintiff's Exhibit L, check April 22, 1914, Hugh Mackay to W. W. Root (p. 183)	1,000.00
Plaintiff's Exhibit M, check April 22, 1914, Hugh Mackay to W. W. Root (p. 184)	500.00
Plaintiff's Exhibit N, check April 23, 1914, Hugh Mackay to W. W. Root (p. 185)	125.00
The amount of commission Mr. Mackay had to pay to borrow a portion of the money...	40.00
Plaintiff's Exhibit O, check April 25, 1914, Hugh Mackay to W. W. Root (p. 186)	183.58
Total	\$4,000.58

Appellee further testified (p. 63), that he paid several amounts in addition to the above Four Thousand Dollars (\$4,000), two of these items being plaintiff's Exhibits Q and R (pp. 188 and 189), the former for the sum of Four Hundred and Fifty Dollars (\$450) and interest, and the latter for Five Hundred Dollars (\$500) and interest.

Appellee testified that at the time of the trial, August, 1915, at Prescott, Mr. Root owed him Four Thousand Dollars (\$4,000) over and above the amount of the two mortgages (p. 65).

There has been introduced in evidence certain demand notes made by R. T. Root, payable to Hugh Mackay, being defendant's Exhibits 9 to 15, both inclusive. These demand notes were given by Mr. Root instead of his endorsing the Company's note, and were made at the time of the delivery by Mr. Root to Mr. Mackay of the Sixteen Thousand Dollar (\$16,000) note, August 25, 1913, in Los Angeles and dated back to the dates of the original advances or a mean date where the advance was in several items of different dates, as follows:

Defendant's Exhibit No. 9, dated September 16, 1911 (p. 197).....	\$ 4,455.00
Defendant's Exhibit No. 10, dated December 13, 1911 (p. 198).....	1,400.00
Defendant's Exhibit No. 11, dated December 19, 1912 (p. 199).....	1,655.00
Defendant's Exhibit No. 12, dated April 22, 1913 (p. 199).....	3,250.00
Defendant's Exhibit No. 13, dated May 23, 1913 (p. 200).....	1,550.00
Defendant's Exhibit No. 14, dated June 19, 1913 (p. 200)	1,100.00
Defendant's Exhibit No. 15, dated August 2, 1913 (p. 201)	2,590.00
	<hr/>
	\$16,000.00

Defendant's Exhibit No. 9 corresponds to defendant's Exhibit No. 4 with interest to the date of Defendant's Exhibit No. 4, June 9, 1913, and is also shown in Defendant's Exhibit No. 32. This latter exhibit illustrates how it was done, the mean date being September

16, 1911. It also shows the interest, \$531.72, and the amount for which one of the checks of date June 9, 1913, was given (Defendant's Exhibit No. 4).

Defendant's Exhibit No. 10 corresponds to Defendant's Exhibit No. 3 with interest to June 9, 1913, treated in a similar manner.

Defendant's Exhibit No. 11 corresponds to defendant's Exhibits Nos. 5 and 7.

Defendant's Exhibit No. 13, corresponds to Defendants Exhibit No. 6 and the Seven Hundred and Fifty Dollars (\$750) mentioned in the testimony (pp. 29 and 30).

Defendant's Exhibit No. 14 corresponds to Defendant's Exhibit No. 17 and One Hundred Dollars (\$100) cash (p. 72).

The endorsement on the back of Defendant's Exhibit No. 15 (p. 201) explains exactly what it was for, namely, interest to August 2, 1913, notes 1 to 6 therein referred to being Defendant's Exhibits No. 9 to 14, inclusive, as an examination of those exhibits will disclose.

Defendant's Exhibit No. 12 is made up of Two Hundred and Fifty Dollars (\$250) in cash and a due bill for Three Thousand Dollars (\$3,000) (p. 86).

It will, therefore, be seen from the exhibits themselves that Mr. Root received from Mr. Mackay the full face value of the Sixteen Thousand Dollar (\$16,000) note, and at the time of taking the Five Thousand Dollar (\$5,000) note or shortly thereafter Mr. Mackay paid to Mr. R. T. Root or to Mr. W. W. Root for Mr. R. T. Root, as authorized in Defendant's Exhibit No. 2, Four Thousand Dollars (\$4,000), and later by reason of having to make good certain guarantees paid the full amount of Five Thousand Dollars (\$5,000). The trial court allowed only the Four Thousand Dollars (\$4,000) with interest. With that allowance the judgment for Sixteen

Thousand Dollars (\$16,000) and interest, amounting to Eighteen Thousand Four Hundred Thirty-four Dollars and Sixty-six Cents (\$18,434.66) and Four Thousand Dollars (\$4,000) and interest, amounting to Four Thousand Five Hundred Twenty-three Dollars and Forty-three Cents (\$4,523.43) is absolutely correct and the figures are incontrovertible.

V.

In addition to the fact that the mortgages were thus duly authorized and executed for a valuable consideration moving to the appellant, complying with every legal requirement, there remains the further fair deduction from all the evidence, and especially the testimony of Mr. Root himself, that Root was the corporation and the corporation was Root. All of the stock represented by certificates assigned in blank was either held by him or by his family in such a way that it lay in his mouth to say that it was his. Even the share that was in the name of Mr. Lowery was assigned in blank and left in the certificate book, his resignation as a member of the Board of Directors was likewise on file undated all from the very beginning of the company. The trial court did not allow Director and Stockholder Lowery to testify concerning the ownership of the stock, because he had been admitted to the bar in his youth in Iowa, but had never practiced, and being in the employ of Mr. Root, was under his constant retainer. Was a part of Mr. Root. The other one share director was Mr. Root's son. His share, according to the undisputed testimony, was likewise left in the book, assigned in blank. All the other shares except one were issued to a Mr. McDermott, also then an employee of Mr. Root. They were likewise held assigned in blank, not transferred on the books of the company. The only share not so assigned was the one share stand-

ing in the name of Mr. Root. All of this is fully corroborated by the stock certificate book (Defendant's Exhibit No. 29). Mr. Root testified that he transacted all of the business of the company in his individual name, procured all the funds for its operation, gave options in his own name for the sale and delivery of all of its holdings, to him the purchase money was to be paid. (Plaintiff's Exhibit F, pp. 177-9.) While every legal step for the validity of these mortgages is present, as previously shown herein, we submit in addition, that in fact and in truth Root was the corporation, and the corporation was Root. He admits that he got the money and has paid nothing on any of the notes (p. 46). The checks with which the amount of the second mortgage was paid bear the endorsement of Mr. Root, and both sons, whom Mr. Root testified constituted the Board of Directors. Courts of equity, as occasions may require, are justified in looking behind the legal fiction of the corporation. The modern tendency of courts is to do that more and more, and where it appears that a corporation is but the double of an individual or individuals, the acts of the individual or individuals bind their double. For authority for this, if authority be necessary, we refer you to the admirable and exhaustive work of William W. Cook of the New York Bar, 6th Edition, Vol. 1, Sec. 6, and the cases there cited. The New York Court of Appeals has said:

“We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth.”

Anthony vs. American Glucose Co., 146
N. Y., 407.

“The corporate existence will be disregarded, and the acts and contracts of the per-

sons holding all the stock will be considered the acts and contracts of the corporation itself, where the effect is the same as though the corporation had acted or contracted as a corporation.”

Cook on Corporations, Vol. 1, Sec. 32, 6th Ed., and cases cited.

Likewise Clark and Marshall lay down the principle that in such a case:

“A court of equity will look beyond the corporation regarded as a legal entity distinct from its stockholders.”

Vol. 1, p. 24, citing *Swift vs. Smith*, 65 Md., 428 (57 Am. Rep., 336);

First National Bank of Gadsden vs. Winchester, 119 Ala., 168; 72 Am. St. Rep., 904;

Bundy vs. Ophir Iron Co., 38 Ohio State, 300;

1 Smith's Cases, 31;

Texarkana and F. T. Ry. Co. vs. Bemis Lumber Co., 55 S. W., 944;

Relley vs. Campbell, 134 Calif., 175; 66 Pac., 220.

While we believe it has been satisfactorily proven that Mr. Root was the real owner of all of the stock, he says it belonged to his wife, notwithstanding the records and his and her numerous statements to the contrary. He, however, admits that she learned of the mortgages soon after they were given (pp. 43, 45), although at least three witnesses aver she knew of them at or before the time of their execution (pp. 53, 105, 115), and

was desirous that they be made so that they (she and her husband) might get some of the money. She went with her husband and Mr. Mackay from Denver to Los Angeles, was there when the first mortgage was made. Was in New York when the second mortgage was executed, and three witnesses say she knew. Dr. Geiermann, an old acquaintance of the Root's, who was trying to get them a loan on this property (p. 115), Mr. Mackay, the appellee, and Mr. Lowery all so testify. The circumstances, the propinquity, the relationship, all bear mute testimony as to such knowledge.

“Today there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper with the knowledge of all of its stockholders.”

“The question is who has been damaged.
 * * * The State is not damaged and cannot enjoin the act; *neither can a stockholder who assents or delays after knowledge of the act*, nor can the purchaser or transferee of stock which assented to the act, nor can a corporate creditor who is sure to be paid; nor can the corporation itself. * * * The theoretical idea that the act is *ultra vires* or that the corporation has exceeded its powers or has violated some shadowy principle of public policy is being rapidly abandoned and the courts are basing their decisions on the logical principles of damage suffered or threatened.”

Cook on Corporations, Vol. 1, Sec. 3, citing cases.

Mrs. Root, therefore, even if she were a stockholder having knowledge, could not complain because, as stated in the text,

“Neither can a stockholder who assents or delays after knowledge.”

We are therefore persuaded that this court, sitting as a court of review, will not disturb the equitable and just judgment of the trial court.

VI.

Relative to Assignments of Error Nos. X and XI, which are general in their nature, they have been fully covered in discussing previous Assignments of Errors. The right to a deficiency judgment would follow in the event the security prove not to be sufficient upon sale to pay the judgment.

We do not presume it necessary to urge upon this court the advantages of the trial court in passing upon the evidence, but we wish to point out the exhaustive and painstaking inquiry the trial court made into all the facts surrounding the execution and delivery by appellant of the instruments sued upon.

Not having received a copy of appellant's brief within the time fixed by the Rules of this Court, we beg to reserve the right to make any and all legal objections thereto if any be later filed.

Respectfully submitted,

BAKER & BAKER,

ROBINSON & ROBINSON,

Attorneys for Appellee.

No. 2876.

UNITED STATES
Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY,
Appellant,

vs.

HUGH MACKAY,

Appellee.

Upon Appeal from the United States District Court for
the District of Arizona.

REPLY BRIEF.

Filed

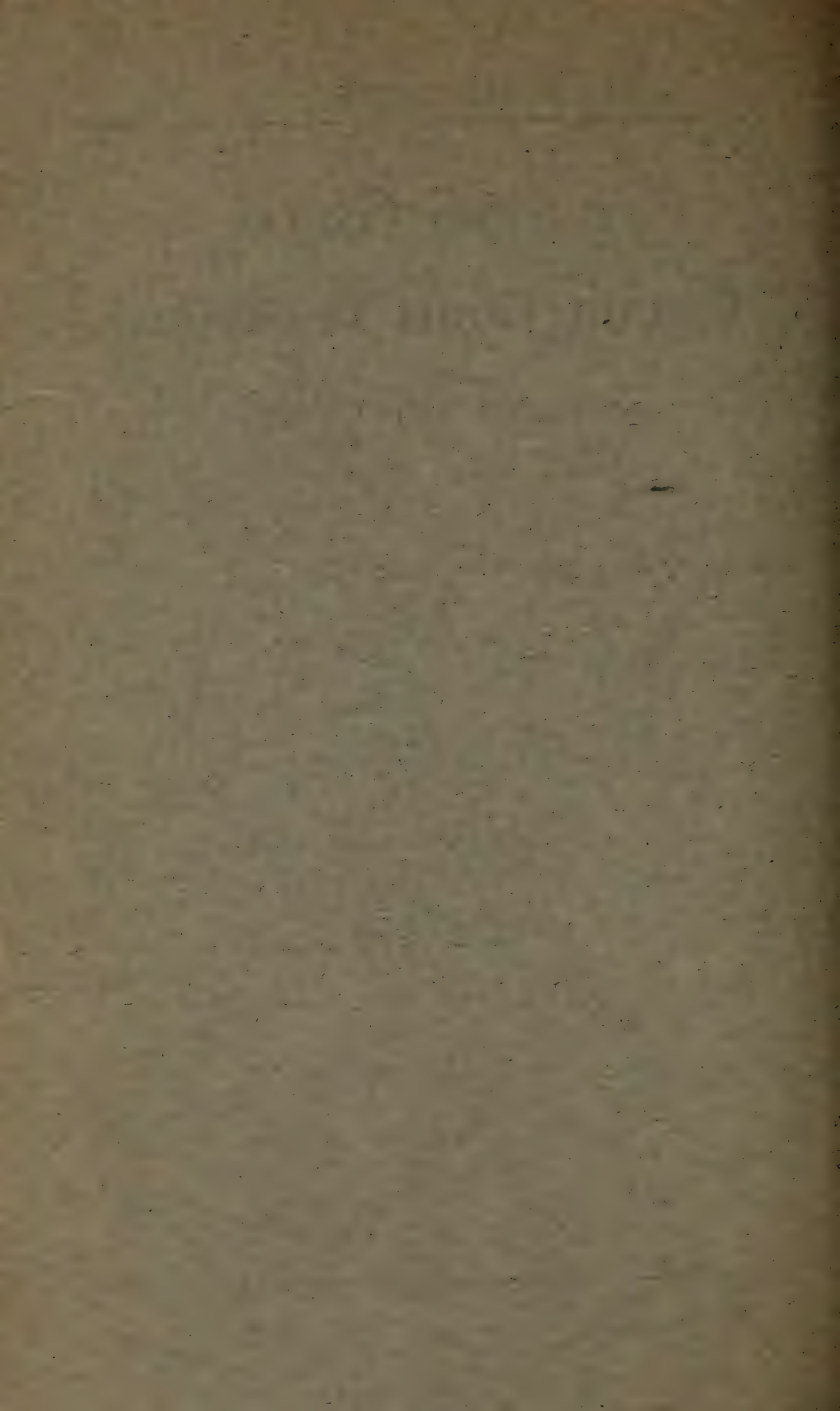
FEB 28 1917

BAKER & BAKER,
ROBINSON & ROBINSON,

Attorneys for Appellee.

F. D. Monckton

Clerk



UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY,
Appellant,

VS.

HUGH MACKAY,

Appellee.

No. 2876.

REPLY BRIEF.

This reply is tendered for the reason that Appellant had not filed or served his brief within the time limited by the rules, and counsel had no opportunity to examine the same before filing the brief of appellee.

We might not have considered it so necessary to reply but for some misstatements of facts in Appellant's brief, as will be disclosed by an examination of the Record:

1. Counsel states that at the time of the transaction out of which this suit arose, W. W. Root was Secretary. This is at least a controverted point. F. W. Lowery testified he was Secretary (p. 102), and prepared the Minutes

(p. 103). In further support of this you will note that the first mortgage was not attested by W. W. Root, while the second was. The testimony of Mr. Mackay is also suggestive, at least, of the fact. He testified that Mr. Root told him Mr. Lowery was a Director (p. 51), that Mr. Lowery did the writing of the resolution and the minutes (p. 52).

2. It is also stated that Mrs. A. G. Root "owned in her own name" nearly all the stock. If this means that the shares stood in her name on the books of the company, it is an error. Nowhere is it so claimed by Appellant. The truth is that they did not. The certificate book did not so show. (Defendant's Exhibit 29.) Mr. Root himself testified that "the certificates were issued to Mr. E. G. McDermott." "The certificates were assigned to her." "Those certificates are now held in trust by a trustee." "I have not got the certificates present in court" (p. 38). "Those certificates have been in Mrs. Root's possession up until the time the trustees had them" (p. 43). The stock, so far as the records of the company and testimony disclosed, stood in the name of E. G. McDermott. Mr. Root only claimed that the certificates were assigned to his wife.

3. As to the minutes of the meeting in July, 1913, counsel at the top of page 8 of his brief used the following language regarding the testimony of Mr. Lowery: "That the resolution so prepared by him was adopted, but that the same was not dated or signed by any of the directors, nor was, so far as he knew, any minutes of said meeting taken or recorded, but that a typewritten copy of the resolution so prepared by him, but undated and unsigned as aforesaid, was left by him and placed as a loose sheet in the minute book of the company (Tr. p. 100-105)." An examination of the record at the pages cited will disclose an entirely different state of facts. It will be found that

the resolution adopted was embodied in the minutes of the meeting, a draft of which minutes was introduced in evidence (Plaintiff's Exhibit W), and which minutes were afterwards typewritten, and as witness, Lowery, says: "I think they were signed" (p. 105). They were not signed by the directors. Minutes are not usually signed by the Board of Directors. They are signed by the Secretary, and when ordered approved, which is usually at a later meeting, they are then signed as approved by the President.

4. In the brief of Appellee, it is stated (pp. 15 and 16) that the meeting of the stockholders and Board of Directors was held July 19, 1913. The meeting was held either on the 22nd or 23rd of July, A. D. 1913. (Mr. Lowery's testimony, pp. 101-103, "Tuesday, July 22nd.") (Mr. Sykes' testimony, pp. 131-134-135-137-143), (Mr. Mackay's testimony, p. 78).

5. In regard to the account books of the company, counsel not having been in the case at the trial, is excused for saying that no effort was made to have those books produced. This is contrary to the fact. Notice to produce was given. Mr. Lowery testified that he presumed the books were in the possession of Mr. Root and that the mortgaged property was generally referred to as the White Hills properties (p. 114). Mr. Root admitted there was a record of the disbursements (p. 37), and such books as Mr. Lowery testified to (pp. 112-113). Counsel for Mr. Root claimed these books were not the books of The Norma Mining Company, although admitting he had them.

6. Counsel in his brief at page 5 says: "It does not appear why the balance that might be procured from the sale of the first mortgage was to be paid to Mr. Root." That is very plain to us. Mr. Root had allowed the debt of the company to him to the full amount of the mortgage

to be cancelled. (Plaintiff's Exhibit W and Testimony of Mr. Lowery, p. 101-2.) That being the case, this balance was his. For the same reason when the Five Thousand Dollar (\$5,000) mortgage and notes were executed an equal amount of the company's indebtedness to Mr. Root was cancelled and the proceeds of any disposition of the notes belonged to Mr. Root. The very fact that the proceeds were to be paid to Mr. Root, as stated by this receipt in Mr. Root's handwriting, although signed by Mr. Mackay, is, if not altogether conclusive, very persuasive of the position of appellee and throws a strong light on how these men, Mr. Mackay and Mr. Root, viewed the transaction at the time.

7. We hesitate to further point out what appears to us to be additional inaccurate statements of counsel for Appellant at page 7 of his brief and repeated at page 16. Counsel states that Mr. Lowery was employed by Mr. Mackay. The Record discloses that Mr. Root took Mr. Mackay to Mr. Lowery's office (p. 51) and asked Mr. Mackay if he would trust Mr. Lowery to prepare the papers (p. 98). Mr. Lowery in turn asked Mr. Root if it would be satisfactory to him that he represent Mr. Mackay. Mr. Root said it would be, as he was anxious for this arrangement. It can hardly be said in the general acceptation of such language that Mr. Lowery had entered the employ of Appellee, Mackay.

8. We presume it is unnecessary to urge on this court that if the facts warranted it, in order to take advantage of the Statute of Limitations, the same must be pleaded. While the facts do not warrant it, no mention was made thereof in the trial court.

9. We are constrained to the view that the principles in support of which counsel has cited some authorities are not applicable to the case at bar, and further, that a reading of the cases will not support the alleged prin-

ciples. It is contended that “a corporation may not be held liable as a mere accommodation maker of notes and mortgages when executed for a purpose other than for which it was organized,” and “that no officer of the company, even if he should control practically all of the stock of the company, may deed or mortgage the assets of the company for other than a corporate purpose.” The record in this case does not disclose the purpose for which the Appellant company was organized. Inferentially, however, it would be deduced that under certain conditions a corporation would be liable as an accommodation maker. Boards of Directors and corporate officers acting in a fiduciary capacity must observe the limitations of their trust. Stockholders, however, are not so restricted. The record here shows that these mortgages were authorized not only by the Board of Directors, but also by the stockholders. The holders of all of the stock of a purely private corporation may do with the assets of the corporation that which they might do with their own. Notwithstanding this, the record in this case shows that these notes and mortgages were not accommodation paper.

10. We believe the Record clearly shows that these mortgages were duly authorized, that the company was indebted to Mr. Root (p. 37, pp. 112-113), and that a valuable consideration passed to the company, viz: the cancellation of an equal amount of its indebtedness to Mr. Root. The very strongest view of all the testimony in favor of the Appellant could only be that there might be a conflict as to whether or not the mortgages were authorized and as to whether or not there was a consideration therefor passing to the Appellant. These issues were issues of fact.

“In chancery cases where the evidence is conflicting and witnesses have been examined orally in court, there is the same necessity exist-

ing as when there has been a trial by jury, that the error in the finding of the facts shall be clear and palpable to authorize a reversal, because the trial judge has the witnesses before him and can observe their manner and appearances, and is thus afforded facilities often of the greatest importance in determining their credibility.”

Hughey vs. Hughey, 48 Ill. App., 315.

“The supreme court, though trying a case *de novo*, on appeal, will not disturb the finding of the district court, unless the finding and decree cannot be reconciled with any reasonable construction of the testimony.”

Gadsden vs. Phelps, 56 N. W., 314.

Justice Thayer in Snider vs. Dobson, 74 Federal, p. 757, says:

“This court, however, has repeatedly declared that where a master or chancellor has considered conflicting evidence, and made a finding thereon, the finding will be taken as presumptively correct, and will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious and important mistake appears to have been made in the consideration of the evidence. Warren vs. Burt, 12 U. S. App. 591, 600, 7 C. C. A. 105, 58 Fed. 101; Latta vs. Granger, U. S. App. 15 C. C. A. 228, 230 and 68 Fed. 69; Paxson vs. Brown, 27 U. S. App. 49, 10 C. C. A., 135, 144, and 61 Fed. 874; Stuart vs. Hayden, 18 C. C. A. 618, 72 Fed., 402, 408; McKinley vs. Williams (decided April 17, 1896), 74 Fed. 94. The same rule has been announced

and acted upon by the Supreme Court of the United States on several occasions. *Tilghman vs. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly vs. Arms*, 129 U. S.; *Furrer vs. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821. See, also, *Richards vs. Todd*, 127 Mass. 172, and *Donnell vs. Insurance Co.*, 2 Sumn. 371, Fed. Cas. No. 3,987. We have concluded, therefore, that, inasmuch as the case turned upon an issue of fact, and inasmuch as the evidence was fully adequate to justify the finding made by the trial judge, it should be allowed to stand."

Respectfully submitted,

BAKER & BAKER,

ROBINSON & ROBINSON,

Attorneys for Appellee.

No. 2876

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),

Appellant,

VS.

HUGH MACKAY,

Appellee.

Filed

JUN 26 1917

F. D. Monckton
Clerk

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

ALFRED SUTRO,
Standard Oil Building, San Francisco,
*Attorney for Appellant
and Petitioner.*

Filed this.....*day of June, 1917.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2876

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),

vs.

HUGH MACKAY,

Appellant,

Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The appellant respectfully asks that the decision of this Honorable Court, made in this cause, on the 7th day of May, 1917, be set aside and a rehearing granted.

It asks this because, under the decree in this case, which has been affirmed, the appellee has foreclosed two mortgages which do not belong to him. It can, we confidently believe, be shown, if a rehearing is granted, that the mortgages, involved in this suit, were not the property of the appellee, but were received by him, in trust, under an agreement in writing with one R. T. Root, to negotiate or sell them, for the ben-

efit of himself and of Root, and, if he could not sell them, then to return them to Root. This agreement between Root and the appellee was, in effect, an agreement between the appellant and the appellee; for, this Court has decided that Root "was in effect the corporation" (i. e., the appellant). If there was such an agreement between the appellee and Root, then, of course, he had no right to foreclose the mortgages in question as his own, and, in that event, the affirmance of the decree of foreclosure works a grave injustice to the appellant.

As defenses to this suit the appellant urged, first, that it never authorized the execution of the mortgages; second, that there was no consideration therefor moving to it; and third, that the mortgages were delivered to the appellee solely for the purpose of negotiating their sale, and not as evidencing any obligation to the appellee, which the latter had the right to enforce against appellant.

This Court holds that, irrespective of the evidence upon the question of actual authorization of the mortgages by the appellant, inasmuch as Root was the owner of all of the shares of the capital stock of the appellant, and "was in effect the corporation", his execution of the mortgages, as president of the appellant, bound the appellant, because, the Court says:

"a court may properly look beyond the corporate form and hold that what would be binding upon the persons composing the corporation would be binding upon the corporation. *Linn Timber Co. v. United States*, 236 U. S. 574; *Linn & Lane Tim-*

ber Co. v. United States, 196 Fed. 593, and cases there cited.”

Upon this application, we respectfully urge that, inasmuch as this Court has decided that “Root was in effect the corporation” and that “what would be binding upon the persons composing the corporation would be binding upon the corporation”, it should, in justice to the parties, also hold that the agreement made by Root with the appellee, that the mortgages should be either sold by the appellee, or otherwise be returned to Root, constituted a part of the contract between the appellant and the appellee. Certainly if, as this Court holds, Root had the power, as sole stockholder, to bind the appellant by his execution of the mortgages, he also had the power, on behalf of the appellant, to contract with the appellee that the mortgages should either be sold by the appellee or be returned to him.

While this Court, in its opinion, states that one of the defenses, urged by the appellant, was that the mortgages “were conditionally delivered to the appellee”, it has not discussed this important point, for the reason, no doubt, that the main point relied upon for a reversal was that the mortgages were not authorized by the appellant.

The record in this case shows, as this Court points out, that the appellee, as executor of the estate of one George Miller, deceased, had loaned to Root \$10,000. belonging to the estate of his decedent; that the appellee was most anxious that these moneys should be repaid to him, and that Root was most anxious to

repay them; that Root was financially embarrassed and could not repay the appellee; that he and the appellee then hit upon the scheme that the appellant should execute the mortgages in question, and that the appellee should take them, not as his own, but for the purpose of selling them; that out of the proceeds of the sale he was to repay to himself the Miller estate moneys loaned to Root and that the balance was to be paid to Root; and that, if he could not sell the mortgages, he was to return them to Root.

When the \$16,000. note and mortgage were delivered to the appellee, on August 2, 1913, he gave Root a receipt, in which he recited that he received the note and mortgage for the purpose of selling them, and, if sold, to pay from the proceeds the \$10,000. loaned by him to Root, and the balance to Root; that Root himself was negotiating for a loan upon the mortgaged property; that, if he made a loan, he was to make a mortgage on the property and to notify the appellee, and if the appellee had not sold the note and mortgage, or if he failed to sell them within one month from the date of the receipt, he was to return them to Root, and that the mortgage was not to be recorded unless sold by the appellee (Tr. pp. 192, 193).

According to this receipt, we submit, there can be no question that there was only a *conditional* delivery of the note and mortgage to the appellee, for the sole purpose of their sale or of their return to Root. For the convenient reference of the Court we here insert the receipt:

“HOTEL ALEXANDER.

Los Angeles, Aug. 2d, 1913.

Received from R. T. Root a note for \$16,000.00 of this date due to my order in 4 months, and a mortgage on 46 patented mining claims in White Hills, Mohave Co., Arizona, executed to me to secure said note, and both the note and the mortgage are executed by the Norma Mining Co. (an Arizona corporation), and said Root informs me that the said 46 mining claims stand in the name of said company on the records of said County.

I have recvd this mortgage and note for the purpose of selling them, and if sold pay from the proceeds recvd from their checks aggregating about \$10,000.00 held by me as executor of the George Miller Estate, which said checks are signed by said Root, and after paying said checks the net balance recvd for said note and mortgage is to be turned over to said Root by me. Said Root says he is now negotiating for a loan upon said property. If he makes a loan he is to make a mortgage on said property and notify said Mackay and if Mackay has not sold said note and mortgage first referred to herein, he is to return same to me, or if said Mackay fails to sell said note and mortgage within one month from date he is to return them to me and the said mortgage first herein referred to is not to be recorded unless sold by said Mackay or his assistants. Said note and Mortgage was first made for \$20,000.00 but afterwards & before I received them they were changed to \$16,000.00 in lieu thereof.

HUGH MACKAY.”

The appellee could, of course, not deny the effect of this writing. He testified, “This mortgage was delivered to me on August 2d to sell” (Tr. p. 87). “I gave a receipt to return it. Yes, I signed Defendant’s Exhibit No. 1” (Tr. pp. 28, 29). He sought to overcome the effect of the writing by testifying, however, that

“Now, if you want to know the arrangement that was made, I will tell it. I took this \$16,000. mortgage as my own as credit” (Tr. p. 55).

“It was delivered to me as my own on the 25th or 26th of August” (Tr. p. 87).

He further claimed that he took the note and mortgage to secure the loans, which, as executor, he had made to Root out of his trust funds. Yet, the record shows that he did not record the mortgages until more than a year later, August 29, 1914 (Tr. pp. 170, 177). Here then was an executor who had loaned \$10,000. of the moneys of the estate of his decedent, for the return of which he was most anxious and worried; he claims to have taken a certain note and mortgage in satisfaction of the loan, and yet he keeps the mortgage in his possession, unrecorded, for more than a year after it was executed. But, there is in the record a significant letter from the appellee to Root, dated August 27, 1914, wherein he explains why he recorded the mortgages. In that letter he says:

“The Heirs are raising Cain and I held the mortgages without being recorded to the last minute, but *had to give them up* and they are recorded.”;

also:

“But if this mortgages are not taken up there will be the worst trouble here for me you ever saw, and these heirs will bring you here to face the music too.”;

further:

“Surely you can get some one to carry the paper temporarily with all that property clear excepting taxes.”;

further:

“It will save me and yourself if you get a buyer there at once to carry it temporarily. If you cannot it will ruin me and likely yourself as these heirs are wild over their money.”;

and, finally, in the postscript to the letter:

“Let me know in some way at once if you can do anything as I am terribly worried and have reason to” (Tr. pp. 218, 219).

This letter stands unexplained. There can, we submit, be no explanation to it consistent with the testimony that the note and mortgage were delivered to the appellee as his own on the 25th or 26th of August of the preceding year.

If they were his own, why did he write to Root excusing himself for recording them?

If they were his own, why did he write to Root that he held them to the last minute, but had to give them up for recordation?

If they were his own, why did he write to Root, still urging him to get some one to carry the paper or to buy the paper?

If they were his own and had been taken in satisfaction of Root's debt to him, why did he write to Root that, unless they were sold and the money raised, he and Root would both be ruined and that he was terribly worried?

The truth is, they were not his own and had not been delivered to him in satisfaction of Root's debt to him; they were delivered to him in trust to sell, or to

return, and not to foreclose for his own benefit and advantage.

But, there is further written evidence, signed by the appellee, of the falsity of the statement, that the note and mortgage were delivered to him as his own on August 25th or 26th, 1913.

On February 12, 1914, he wrote to Root:

“The 16000 note is over due and cannot be handled unless the taxes are paid or enough reserved out of the amount to pay them, etc.”;

On February 13, 1914, he wrote to Root:

“I wrote you yesterday, and hope I made it plain that there is no use of your expecting me to sell the 16000.00 note with 3000. taxes against the property, no abstract, etc.”;

further:

“My impression is that if you expect the money to pay the estate from that source, you better have a new mortgage properly made for enough to pay the estate and taxes and any expense in selling the mortgage.” (Tr. p. 210);

further:

“Anyhow the acknowledgment must be corrected on the mortgage before you could handle excepting with a person whom you would know and went by what you would tell him.”;

further:

“I said on your return you would come up *with me* to the Court House and explain these loans. I had to admit that the loans were made temporarily on demand, that I believed they would be meet as stated, but had to take these securities when the time came. You can corroborate all I said.”;

further:

“However, the money must be paid without delay. Get it some way even if you have to make a sacrifice, if you think the show is good to get it there I will come at once, although in all fairness you should send me expense money.”;

and then there appears this in the record:

“(Notation on side of letter.)

It is important that you advise me promptly of what you can do, unless settlement can be made this 16000 Mort. must be recorded, that I cannot prevent” (Tr. pp. 211, 212).

Why, if he owned the mortgage, did he write to Root that the \$16,000. note is overdue and cannot be handled unless the taxes are paid, or enough reserved out of the amount to pay them?

Why, if the mortgage was delivered to the appellee as his own, and not for the purpose of selling, did he write to Root that he hoped he had made it plain that there was no use of Root's expecting him to sell the \$16,000. note with \$3000. taxes against the property, no abstract, etc.?

Why, if he owned the mortgage, did he write to Root that if Root expected the money to pay the estate from that source he better have a new mortgage properly made for enough to pay the estate and taxes and any expense in selling the mortgage?

Why, if he owned the mortgage, did he not insist on a proper and corrected acknowledgment, instead of writing to Root that anyhow the acknowledgment must be corrected on the mortgage before it could be handled?

Why, if he owned the mortgage, did he write to Root that he had said to the Court that Root, on his return, would go with him to the Court House and explain these loans; that he had to admit that the loans were made temporarily on demand; that he believed they would be met as stated, but that he had to take these securities when the time came, and THEN SUGGEST TO ROOT THAT ROOT CAN CORROBORATE ALL HE SAID?

Finally, is it consistent with the appellee's claim of ownership of the note and mortgage, for him to write to Root that, unless settlement can be made, the \$16,000. mortgage must be recorded, that he could not prevent recording it?

The testimony of Root concerning the conditional delivery to the appellee of the mortgage, for the purpose of selling it, is clear and positive. He testified:

"This mortgage, \$16,000. mortgage, was delivered conditionally to Mr. MacKay to be sold by Mr. MacKay, and a purchaser to be procured" (Tr. p. 40).

"The first mortgage was never sold. It was conditionally delivered to Mr. MacKay and never returned to me."

"I did not demand the return of the first mortgage as he was still making an effort to sell it, and that continued right along. The first mortgage was long overdue. Mr. MacKay was endeavoring to sell it as his time for selling the mortgage had been extended" (Tr. p. 41).

"There was an extension asked for or granted to Mr. Mackay of the time within which he could sell this mortgage."

“The mortgage was never given to him as security but was given to him for selling only. At various times Mr. Mackay applied to me for leave to have the mortgage recorded. I always told him not to record it” (Tr. p. 42).

In reply to this application, the appellee may urge that strong evidence, that he had taken the notes and mortgages in question in satisfaction of the indebtedness of Root to himself, is furnished by the fact that Root produced and introduced in evidence his canceled checks, which he had given the appellee for the moneys of the Miller estate, loaned to him by the appellee; but, the record shows, by the testimony of the appellee himself, that, for those checks, Root gave *his own five promissory notes to the appellee*—NOT THE NOTES OF THE APPELLANT INVOLVED IN THIS ACTION; that the appellee had Root’s notes in his possession; that on his cross-examination they were produced and introduced in evidence and their dates explained. These notes were defendant’s Exhibits Numbers 9, 10, 11, 12, 13 and 14 (Tr. pp. 71, 72, 197-199, 200), and aggregated in amount \$10,160. The amount of Root’s checks held by the appellee and which he surrendered to Root was \$10,036.18, Exhibits 3, 4, 5, 6, 7, 8 and 17 (Tr. pp. 194-197, 203).

We have, on this application, sought to point out to the Court some of the evidence in the record in this case, which demonstrates, we submit, the truth of our statement that the appellee has, by this action, attempted to foreclose two mortgages which do not belong to him, and that he has imposed upon this Court and the trial Court. There is more evidence of a similar

character in the record. We believe we have, however, cited sufficient to raise such a doubt in the mind of the Court, concerning the justice and correctness of the decree in this case, as to entitle the appellant to a rehearing.

Dated, San Francisco,

June 25, 1917.

Respectfully submitted,

ALFRED SUTRO,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

ALFRED SUTRO,
*Counsel for Appellant
and Petitioner.*

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

H. H. RIDDELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

Filed

NOV 15 1916

F. D. Monckton,
Clerk.

No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

H. H. RIDDELL,

Plaintiff in Error,

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Upon Writ of Error to the District Court of the
United States for the District of Oregon.

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*United States Circuit Court of Appeals for the Ninth
Circuit.*

H. H. RIDDELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Names and Addresses of the Attorneys of Record:

MR. E. B. DUFUR, Abington Building, Portland,
Oregon; GILTNER & SEWELL, Yeon Build-
ing, Portland, Oregon; MR. WALLACE McCA-
MANT, Northwestern National Bank Building,
Portland, Oregon, for the Plaintiff in Error.

MR. CLARENCE L. REAMES, United States At-
torney, Post Office Building, Portland, Oregon, for
the Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon,—ss.

To the United States of America and to C. L. Reames,
United States Attorney for the District of Oregon,

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein H. H. Riddell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 19th day of September in the year of our Lord, one thousand, nine hundred and sixteen.

CHAS. E. WOLVERTON,

Judge.

Service of the within citation is admitted this 19th day of September, 1916.

CLARENCE L. REAMES,

United States Attorney.

Filed September 19, 1916.

G. H. MARSH, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

H. H. Riddell,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America.

To the Judge of the District Court of the United States
for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between the United States of America, plaintiff and defendant in error, and H. H. Riddell, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United

States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States this 19th day of September, 1916.

(Seal)

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

Service of the foregoing Writ of Error made this 19th day of September, 1916, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

Filed September 29, 1916.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

MARCH TERM, 1914.

BE IT REMEMBERED, That on the 23rd day of May, 1914, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to-wit:

INDICTMENT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

H. H. Riddell,

Defendant.

INDICTMENT for the Violation of Sections 213-215
of the Federal Penal Code.

United States of America,
District of Oregon,—ss.

The Grand Jurors of the United States of America for the District of Oregon, duly empaneled, sworn and charged to inquire within and for the said District, upon their oaths and affirmations do find, charge, allege and present:

That H. H. Riddell, the above named defendant, together with one J. T. Conway and one Frank Richet, his associates, having devised and intending to devise a scheme and artifice to defraud one Mrs. Patsy Doran and divers other persons to this grand jury unknown,

and to obtain from them and each of them money and property by means of false, fraudulent and misleading pretenses, representations, inducements and promises, which said scheme and artifice to defraud is hereinafter more specifically set forth and described, the said H. H. Riddell, the above named defendant, did knowingly, unlawfully and feloniously, on, to-wit, the 12th day of July, 1911, at Portland in said State and District, and within the jurisdiction of this Court, place and cause to be placed in the postoffice and station of the United States Postoffice establishment at Portland, Oregon, and in the mails thereof and of the United States, for the purpose of furthering and executing the said scheme and artifice to defraud, and attempting so to do, and for mailing and delivery, a certain letter enclosed in an envelope with postage fully prepaid thereon and addressed to A. H. Brobst, Vancouver, Wash., and which said letter was and is of the tenor and effect in substance as follows, to-wit:

**“OREGON INLAND DEVELOPMENT
COMPANY**

Incorporated

1121-1122-1123 Yeon Building

Address all communications to The Company.

Phone Main 133.

Frank Richet,

President, Treasurer.

J. T. Conway,

Vice Pres. & Gen'l Mgr.

H. H. Riddell,

Secretary.

July, 12, 1911.

A. H. Brobst,

Vancouver, Wash.

Dear Sir:

Your letter of July 10 is received enclosing application for contract bearing date of July 7, signed by your son. I note you state that you hope we can handle this contract from Mr. Hillias for your son and afterwards exchange it for Tract 9 or 11 in Plat 104. Mr. Conway is now at La Grande. He is expected back within a couple of days, and on his return will answer your letter more fully.

Very truly yours,

OREGON INLAND DEVELOPMENT COMPANY."

H.H.H. FY.

and which said scheme and artifice so to defraud then and there being in and by the following means, methods, plans and modes, that is to say:

That the said defendant, H. H. Riddell, together with the said J. T. Conway and Frank Richet, his said associates, acting personally and as officers of the Oregon Inland Development Company, a corporation organized under the laws of the State of Oregon, would falsely and fraudulently pretend, represent, promise and hold out to the said Mrs. Patsy Doran and the said divers other persons to the grand jury unknown and to the public generally, that the said Oregon Inland Development Company was the owner of forty thousand (40,000) acres of farm lands in the State of Oregon,

and that the said defendant and his said associates and the said Oregon Inland Development Company (hereinafter referred to and designated as the Company) intended to and would subdivide the said 40,000 acres of land into 3,086 farms of the following numbers and sizes, to-wit: 2,712 farms of 10 acres each—200 farms of 20 acres each—150 farms of 40 acres each—20 farms of 80 acres each—2 farms of 160 acres each—1 farm of 320 acres and one farm of 640 acres; and the said defendant and his said associates, acting as aforesaid, would further falsely and fraudulently pretend and represent, promise and hold out that the said company was the owner of 3,086 town lots in the townsite at Klamath Falls, Oregon, the county seat of Klamath County; and that the said defendant and his said associates and the said company would sell one farm and one of said lots for the sum of \$240.00, payable ten dollars down and ten dollars per month until the full sum of \$240.00 should have been paid; and further, that the said 40,000 acres of land so by said company owned, was and is farm and fruit land of high quality, situated in Sections 16 and 36 and located in the following named counties in the State of Oregon, to-wit: Baker, Crook, Curry, Douglas, Grant, Harney, Jackson, Klamath, Lake, Linn, Lincoln, Malheur, Sherman, Union, Umatilla, Wallowa, Wasco and Wheeler; and further, that the said 40,000 acres of land so by said company owned, were choice farm lands covered with sagebrush and timber, and the said defendant and his said associates acting as aforesaid, did further falsely and fraudulently represent, promise, pretend and hold out to the said Mrs.

Patsy Doran and to the said divers other persons and to the public generally, that in many cases the lands adjoining and contiguous to lands pretended by the said defendant and his said associates to be owned by the said company, were then being farmed and planted in orchards, and that the said lands so pretended to be owned by said company were also fruit and orchard lands; and the said defendant and his said associates acting as aforesaid, did further falsely and fraudulently represent, promise, pretend and hold out to the said Mrs. Patsy Doran and to said divers other persons and to the public generally, that the said company was the owner in fee simple of the said 40,000 acres of farm land and of the said 3,086 town lots in Klamath Falls, and that the title of said company thereto was perfect and that any persons purchasing the contracts offered for sale by said defendants and the said company, would receive good and sufficient title to said lands from the said company; and the said defendant, acting with his said associates, did further falsely and fraudulently represent, promise, pretend and hold out to each and all of the persons hereinbefore mentioned and to the public generally, that deeds to the said 40,000 acres of farm lands which vested title to said lands in said company, had been theretofore executed by John Veasen and Lulu Veasen, husband and wife, under date of April 25, 1910; and further that the said scheme and artifice so to defraud, was to be further executed, carried out and effected by the said defendant and his said associates and the said company increasing the price to be paid by the purchasers of the said contracts of sale of said company,

from \$240.00 to \$300.00 each; and by falsely and fraudulently issuing, circulating, printing and distributing a certain illustrated booklet entitled "Grande Ronde District, Oregon," which said booklet, among other things, contained a purported and pretended map and chart of Union, Wallowa and portions of Baker counties, Oregon, and which said map of said counties had large portions thereof identified in red colors, and the said defendant and his associates acting as aforesaid, would and did further falsely and fraudulently pretend, represent, promise and hold out to the persons aforesaid and to the public generally, that each of said townships so on said map identified and outlined in red, contained 10 and 20 acre tracts and farms owned by the said company; and did further falsely and fraudulently represent, pretend, promise and hold out to the persons aforesaid and to the public generally, that the most careful care had been exercised by the said defendant and his said associates acting as aforesaid in the selection of the said 10 acre tracts owned and for sale by the said company, and that the lands so claimed and represented to be owned by the said company in the counties of Union, Wallowa and Baker aforesaid, were and are neither mountainous nor swamp lands; and further, that the said defendant and his said associates, acting as aforesaid, did falsely and fraudulently pretend, represent, promise and hold out to the persons aforesaid, that the said town lots so represented by them and by the said company to be owned by it, were at and a part of and contiguous and adjacent to the town and City of Klamath Falls, Oregon, and that each thereof was alone worth

the amount of the selling price of the contracts of said company, when in truth and in fact and as he the said defendant then and there well knew, the said lands and lots so by defendant and his associates and said company pretended to be owned and claimed by said company at Klamath Falls, Oregon, were and are not at, in and a part of or contiguous or adjacent to the city and town of Klamath Falls, Oregon, but were and are situated and located at a place of not less than a mile and a half distant from the nearest portion of the said town and city of Klamath Falls and not less than two miles from the business portion of said city and town, and then and there were and now are, as he the said defendant at all times well knew, not of the value and amount at which the contracts of said company were sold, and were and are of little or no value whatsoever.

And further, that the said defendant and his said associates, in the execution and furtherance and as a part and portion of the said scheme and artifice to defraud, would and did have and cause to be printed, published, circulated, mailed and generally distributed, large numbers of a certain poster, which said poster had written across it in bold red ink, "Grande Ronde District, Oregon," and which said poster had delineated upon it, numerous half tone reproductions of photographs named, labeled and described by the following designations, to-wit: "Native Hay Scene on Our Land Near Promise," "Scene on our land in Baker County, Note the Deep Soil on Creek Bank," "Trout Stream Crossing One Corner of our 20 Acre Tract Southeast of Elgin," "Scene on Our Land West of La Grande," "Part of

Our Land Near Enterprise,” “Part of our Land Near North Powder,” “Part of Our Land in Baker County, Showing Creek,” “Scene on One of Our 40 Acre Tracts Near Imbler,” “Part of Our Land Near La Grande, Note the Gentle Slope,” and which said statements, labels, legends and delineations were false, fraudulent, misleading and untrue in every particular, as he the said defendant then and there well knew, and when in truth and in fact as the said defendant then and there well knew, the said company did not own or have any lands in either Baker or Wallowa County, Oregon, and when in truth and in fact and as the said defendant then and there well knew, the cut and reproduction labeled “Native Hay Scene on our Land Near Promise,” was not a reproduction of a scene on any land owned by said company; and when in truth and in fact and as the said defendant well knew, the said company had and owned no lands near Promise; and when in truth and in fact the said cut and reproduction labeled and designated “Part of Our Land Near Enterprise,” was false, fraudulent and untrue, in that the said company did not own or have any lands near Enterprise, Oregon; and when in truth and in fact and as the said defendant then and there well knew, the said cut labeled and designated “Part of Our Land Near North Powder,” was false, fraudulent, misleading and untrue in this, that the said company did not and does not have or own any land near North Powder, Oregon; and when in truth and in fact and as he the said defendant then and there well knew, the said cut and reproduction on said poster labeled and designated “Part of Our Land in Baker County Show-

ing Creek," was false, fraudulent, misleading and untrue in that the said company did not and does not own any land in Baker County, Oregon, and the photograph there so reproduced as aforesaid, was not taken on and did not delineate or show any portion of any lands owned by said company in Baker County, Oregon, or elsewhere; and when in truth and in fact and as he the said defendant then and there well knew, the said cut and reproduction on said poster labeled and designated "Scene on One of Our 40 Acre Tracts Southeast of Imbler," was and is false, fraudulent, misleading and untrue in that the said defendant then and there well knew that the said photograph so reproduced on said poster, was not a photograph or delineation of or taken on any land owned by the said company southeast of Imbler or elsewhere or at all; and when in truth and in fact and as he the said defendant then and there well knew, the said cut and reproduction on said poster labeled and designated "Part of Our Land Near La Grande, Note the Gentle Slope," was false, fraudulent and misleading in this that the said company did not and does not own any land near La Grande, Oregon, and that the said photograph so reproduced, was not taken on and did not portray a part of any lands owned by the said company near La Grande nor at all; and when in truth and in fact and as he, the said defendant then and there well knew, the said cut and reproduction on said poster labeled "Scene on Our Land West of La Grande," was and is false, fraudulent, misleading and untrue in this, that the said company did not and does not own any land west of La Grande, and the photo-

graph so reproduced on the said poster and so labeled and designated, was not taken on and did not portray a scene of any land owned by the said company west of La Grande or at all; and when in truth and in fact and as the said defendant then and there well knew, the said cut and reproduction on the said poster labeled "Trout Stream Crossing One Corner of Our 20 Acre Tract Southeast of Elgin," was and is false, fraudulent and misleading and untrue in this, that the said photograph so reproduced on said poster did not and does not portray any trout or other stream crossing a corner of any one of the 20 acre tracts owned by the said company southeast of Elgin or at all, but did and does portray a portion of the Grande Ronde River a few miles distant from Rondowa, Oregon, and many miles distant from any land whatsoever owned by said company; and when in truth and in fact and as he the said defendant than and there well knew, the said cut and reproduction on said poster labeled "Scene on Our Land in Baker County, Note the Deep Soil on Creek Bank," was false, fraudulent and misleading and untrue in this, that the said company did not and does not own any land in Baker County, Oregon, and the said photograph and reproduction so on said poster labeled and designated, does not and did not portray a scene on any lands owned by the said company in Baker County or elsewhere or at all. And when in truth and in fact and as he, the said defendant then and there well knew, the said company was not the owner of 40,000 acres of farm land in the State of Oregon, nor was the said company nor the said defendant nor his said associates the owner

or owners of 3,086 town lots in the townsite of Klamath Falls, Oregon, and when in truth and in fact and as he the said defendant then and there well knew, the said 40,000 acres of land so claimed to be owned by said company, was not and is not farm or fruit land of high quality, but were and are high, bleak, cold, rocky, non-arable, non-tillable, scab and mountainous lands, fit only for use as grazing lands and totally unfit for orchard culture and cultivation; and when in truth and in fact and as he, the said defendant then and there well knew, the said 40,000 acres of lands so claimed to be owned by the said company, were and are not orchard lands or capable of being farmed, and it was not and is not true and the said defendant then and there well knew that the lands adjoining and contiguous to the said lands so pretended to be owned by the said company, were and are not in many instances or at all, capable of being farmed or planted in orchards; and when in truth and in fact and as he, the said defendant then and there well knew, the said defendants was not and is not the owner in fee simple or at all of the said 40,000 acres of farm lands or the said 3,086 town lots; and when in truth and in fact and as he the said defendant then and there well knew, the deeds so claimed to be executed by John Veasen and Lulu Veasen, did not vest title to the lands therein described in the said company, for the reason that the said deeds were to be placed in escrow and were never delivered to the said company or to any representative thereof; and when in truth and in fact and as he the said defendant then and there well knew, it was not and is not true that each of the townships designated

in red on that certain map in that certain illustrated booklet entitled "Grande Ronde District, Oregon," contained and contains 10 and 20 acre tracts owned by the said company, but in truth and in fact, the said company owned and owns no lands in either Baker or Wallowa counties, Oregon, and owned lands in but six of the said townships so designated in red; and when in truth and in fact and as the said defendant then and there well knew, the said 10 and 20 acre tracts advertised for sale in and by the said circular and pamphlet entitled "Grande Ronde District, Oregon," were not and are not orchard lands of high grade and quality, but were and are high, bleak, rough, rocky, frosty, non-arable, non-tillable and inaccessible mountainous lands, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE:

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That the said H. H. Riddell, together with one J. T. Conway and one Frank Richet, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of the false and fraudulent representations, pretenses and promises set out in the first count of this indictment, to which reference is hereby made, and by which reference the said description of said scheme and artifice so to defraud is hereby made a part of this Count Three of this indict-

ment, the said H. H. Riddell the above named defendant, at Portland aforesaid and within the jurisdiction of this Court, on to-wit, the 26th day of June, 1911, and for the purpose of furthering and executing said scheme and artifice to defraud, and attempting so to do, did knowingly, unlawfully and feloniously place and cause to be placed in a postoffice of the United States of America, to-wit, the postoffice at Portland aforesaid, for mailing and delivery in and by the mails of the United States, a letter inclosed in an envelope with postage fully prepaid thereon, addressed to W. C. Hayward, Manilla, Iowa, and which said letter was and is of the tenor and effect as follows, to-wit:

OREGON INLAND DEVELOPMENT
COMPANY

Incorporated

1121-1122-1123 Yeon Building

Address all communications to The Company.

Phone Main 133

Frank Richet,

President-Treasurer.

J. T. Conway,

Pres, & Gen'l Mgr.

H. H. Riddell,

Secretary.

Portland, Oregon, 6/26/11.

W. C. Hayward,

Manilla, Iowa.

Dear Sir:

The sale of our contracts on the auction plan will close in the very near future. We are placing

on the market and have sold several ten acre tracts, which we are selling on terms of \$10 down and \$10 per month without interest or taxes. The purchase price being \$300 per tract. There is no town lot in connection with this new proposition. It is a straight purchase of a specified ten acre tract. We have decided to permit a number of our present contract holders on the auction plan to select one of these ten acre tracts in lieu of their present contracts; crediting them with the amount they have previously paid together with discount, if any, to apply on the purchase of a ten acre tract. In addition to this, they will receive a town lot at Klamath Falls when the same is allotted as per their original contract.

In addition to these \$300 tracts we have some higher priced lands that are selling at \$400 and \$500 per tract. We will also upon request, accept transfer of the present contracts to apply on these higher priced lands. Contract holders may at their pleasure select a representative at their own expense and send him to La Grande from which point we would take him to make inspection and selection—for his people. We cannot, however, hold a large body of this land off the market unless some action is taken immediately. We herewith enclose plats of 32 ten acre tracts. We are writing our representative in Iowa, M. Hillias, 505 W. Broadway, Council Bluffs, Ia., and would suggest that you work in conjunction with him in as much as it would prevent two people selecting the same tract. He

can arrange for you to have your acreage adjoining that of a neighbor if you and they so desire. We wish to urge upon you the necessity of immediate action in as much as that if you fail to take advantage of this offer at this time, and decide later that you wish a specified ten acre tract, it will of course necessarily be located farther out than our present offerings, and we cannot at this time agree to transfer your contract if you do not make immediate application. Call and see Mr. Hillias at once and oblige.

Yours very truly,

OREGON INLAND DEVELOPMENT COMPANY

J. T. Conway,

Vice-Pres. & Gen. Mgr.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT FOUR:

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That the said H. H. Riddell, together with one J. T. Conway and one Frank Richet, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent representations pretenses and promises set out in the first count of this indictment, to which reference is hereby made, and by which reference the said

description of said scheme and artifice so to defraud is hereby made a part of this Count Four of this indictment, the said H. H. Riddell, the above named defendant, at Portland aforesaid, and within the jurisdiction of this Court, on to-wit, on or about June 9, 1911, and for the purpose of furthering and executing said scheme and artifice to defraud, and attempting so to do, did knowingly, unlawfully and feloniously place and cause to be placed in a postoffice of the United States of America, to-wit, the postoffice at Portland aforesaid, for mailing and delivery in and by the mails of the United States, a certificate enclosed in an envelope with postage fully prepaid thereon, addressed to a person or persons and address to this grand jury unknown, and which said certificate was and is of the tenor and effect as follows, to-wit:

“\$300.00

No. 557

OREGON INLAND DEVELOPMENT CO.

Clearance Receipt.

Portland, Oregon, June 9, 1911.

THIS CERTIFIES that E. H. Bryant, of Gallup, New Mexico, has made application for one of the three thousand and eighty-six (3,086) tracts and one of the three thousand and eighty-six (3,086) lots, in an adition at Klamath Falls, Oregon, and has made full payment of the sum of Three Hundred (\$300.00) Dollars, the purchase price thereof, and is thereby entitled to a deed to one tract and one lot, according to the contract of purchase, free and clear of encumbrances, as soon as

said tract and lot is segregated and apportioned to him, and in accordance with all the rights and benefits contained in the terms and conditions in his application to purchase said tract and lot and such deeds will be executed and delivered at that time to him or his assigns and after registration of this receipt by the Northern Trust Company, Portland, Oregon.

IN WITNESS WHEREOF, the said Oregon Inland Development Co., a corporation organized and existing under and by virtue of the laws of the State of Oregon, has caused this receipt to be executed by its President and Secretary and its corporate seal attached hereto at City of Portland, Oregon, on this 9th day of June, 1911.

OREGON INLAND DEVELOPMENT Co.,

By F. Richet, President.

Attest: H. H. Riddell, Secretary.

(OREGON INLAND
DEVELOPMENT
COMPANY.

(NORTHERN
TRUST CO.
Portland, Oregon.
Incorporated 1909

Corporate SEAL
1909)

SEAL)

THIS IS TO CERTIFY that the foregoing Clearance Receipt No. 557 is one of a series of Three Thousand Eighty-six (3,086) issued by the above named Oregon Inland Development Co., and the undersigned Registrar will not register more

than the said Three Thousand Eighty-six (3,086) Clearance Receipts.

NORTHERN TRUST CO., REGISTRAR,
By Jeremiah Miller, President."

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT FIVE:

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge allege and present:

That the said H. H. Riddell, together with one J. T. Conway and one Frank Richet, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of the false and fraudulent representations, pretenses and promises set out in the first count of this indictment, to which reference is hereby made, and by which reference the description in said count of said scheme and artifice so to defraud is hereby made a part of this Count Five of this indictment, the said H. H. Riddell, the above named defendant, at Portland aforesaid, and within the jurisdiction of this Court, on to-wit, the 29th day of May, 1911, and for the purpose of furthering and executing said scheme and artifice to defraud, and attempting so to do, did knowingly, unlawfully and feloniously place and cause to be placed in a post office of the United States of America, to-wit, the postoffice at Portland aforesaid, for mailing and delivery in and by the mails

of the United States, a certificate and writing enclosed in an envelope, with postage fully prepaid thereon, addressed to J. K. Hartline, Albuquerque, New Mexico, and which said certificate was and is of the tenor and effect as follows, to-wit:

“\$300.00

No. 554

OREGON INLAND DEVELOPMENT CO.

Clearance Receipt.

Portland, Oregon, May 29, 1911.

THIS CERTIFIES that J. K. Hartline, of Albuquerque, New Mexico, has made application for one of the three thousand and eighty-six (3,086) tracts and one of the three thousand and eighty-six (3,086) lots, in an addition at Klamath Falls, Oregon, and has made full payment of the sum of Three Hundred (\$300.00) Dollars, the purchase price thereof, and is thereby entitled to a deed to one tract and one lot, according to the contract of purchase, free and clear of encumbrances, as soon as said tract and lot is segregated and apportioned to him, and in accordance with all the rights and benefits contained in the terms and conditions in his application to purchase said tract and lot and such deeds will be executed and delivered at that time to him or his assigns and after registration of this receipt by the Northern Trust Company, Portland, Oregon.

IN WITNESS WHEREOF, the said Oregon Inland Development Co., a corporation organized

and existing under and by virtue of the laws of the State of Oregon, has caused this receipt to be executed by its President and Secretary and its corporate seal attached hereto at City of Portland, Oregon, on this 29th day of May, 1911.

OREGON INLAND DEVELOPMENT Co.,

By F. Richet, President.

Attest: H. H. Riddell, Secretary.

(OREGON INLAND
DEVELOPMENT
COMPANY
Corporate SEAL
1909)

(NORTHERN
TRUST CO.
Portland, Oregon.
Incorporated 1909
SEAL)

THIS IS TO CERTIFY that the foregoing Clearance Receipt No. 554 is one of a series of Three Thousand Eighty-six (3,086) issued by the above named Oregon Inland Development Co., and the undersigned Registrar will not register more than the said Three Thousand Eighty-six (3,086) Clearance Receipts.

NORTHERN TRUST CO., REGISTRAR,

By Jeremiah Miller, President."

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 21st day of May, 1914.

A TRUE BILL.

M. BILLINGS,

Foreman U. S. Grand Jury.

E. A. JOHNSON,

Assistant U. S. Attorney.

(Endorsed) A True Bill. M. Billings, Foreman
Grand Jury.

Filed May 23, 1914.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 23rd day of November,
1916, there was duly filed in said Court and cause,
a Demurrer to the Indictment, in words and figures
as follows, to-wit:

DEMURRER TO INDICTMENT.

Now comes the defendant and demurs to the indictment heretofore returned against him and to the several counts thereof for the reasons following:

I.

Defendant demurs to count one of said indictment for the reason that the same is duplicitous and charges the defendant with the commission of more than one offense.

And for the further reason that said count does not state facts sufficient to constitute an offense against the laws of the United States, and does not charge an intention to defraud any one.

II.

Defendant demurs to count two of said indictment for the reason that the same does not state facts sufficient to constitute an offense against the laws of the United States.

And for the further reason that the said count two does not charge defendant with having devised any scheme or artifice to defraud any one, and does not charge any intention to defraud any one.

And for the further reason that said count two is duplicitous.

III.

Defendant demurs to count three of said indictment for the reason that said count three does not state facts sufficient to constitute an offense against the laws of the United States.

And for the further reason that said count three does not charge defendant with having devised any scheme or artifice to defraud any one, and does not charge an intention to defraud any one.

And for the further reason that said count three is duplicitous.

IV.

Defendant demurs to count four of said indictment for the reason that said count four does not state facts sufficient to constitute an offense against the laws of the United States.

And for the further reason that said count four does not charge defendant with having devised any scheme or artifice to defraud any one, and does not charge an intention to defraud any one.

And for the further reason that said count four is duplicitous.

V.

Defendant demurs to count five of said indictment for the reason that said count five does not state facts sufficient to constitute an offense against the laws of the United States.

And for the further reason that said count five does not charge defendant with having devised any scheme or artifice to defraud any one, and does not charge an intention to defraud any one.

And for the further reason that said count five is duplicitous.

VI.

Defendant demurs to count six of said indictment for the reason that said count six does not state facts sufficient to constitute an offense against the laws of the United States.

And for the further reason that said count six does not state facts sufficient to show whether the scheme mentioned in said count was in fact a lottery.

And for the further reason that it does appear from the allegations and recitals of count one of said indict-

ment that an exact description of all the lands and lots mentioned in said count six was known to the Grand Jury.

VII.

Defendant demurs to count seven of said indictment for the reason that said count seven does not state facts sufficient to constitute an offense against the laws of the United States.

And for the further reason that said count seven does not state facts sufficient to show whether the scheme mentioned in said count seven was in fact a lottery.

And for the further reason that it does appear from the recitals in count one of said indictment, that an exact description of all the lots and lands mentioned in said count seven were known to the Grand Jury.

VIII.

Defendant demurs to said indictment and to the whole thereof for the reason that said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

GILTNER & SEWALL,

Attorneys for Defendant.

I certify that I have examined the within demurrer and that the same is in my opinion well founded in law.

RUSSELL E. SEWALL,

Attorney for Defendant.

Filed November 23, 1914.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, the 14th day of December, 1914, the same being the 37th Judicial day of the regular November, 1914, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ON DEMURRER.

This cause was heard upon the demurrer to the indictment herein, and was argued by Mr. Everett A. Johnson, Assistant United States Attorney, and by Mr. R. R. Giltner, of counsel for said defendant; on consideration whereof, it is Ordered and Adjudged that said demurrer be and the same is hereby overruled except as to the sixth and seventh counts of said indictment and that the demurrer to said sixth and seventh counts be and the same are hereby sustained; whereupon it is Ordered that said defendant appear before this Court and enter his plea to the indictment herein on Monday, December 21, 1914.

And afterwards, to-wit, on Thursday, the 13th day of January, 1916, the same being the 64th Judicial day of the regular November, 1915, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD EMPANELLING JURY.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendant

in his own proper person and by Mr. E. B. Dufur, Mr. William P. Myers, and Mr. Wallace McCamant, of counsel; whereupon this being day set for the trial of this cause, now come the following named jurors to try the issues joined, viz.: John A. Ficke, J. H. Abrey, A. J. Monk, Geo. V. Bishop, W. D. Donahue, J. J. Kenney, G. A. Harth, F. Joplin, E. M. Simonton, Wilson Fike, John Sleret, and Louis F. Hadley, twelve good and lawful men of the district who being accepted by both parties and duly empaneled and sworn proceed to hear the evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued until Friday, January 14, 1916, at 10 o'clock A. M.

And afterwards, to-wit, on Wednesday, the 26th day of January, 1916, the same being the 75th Judicial day of the regular November, 1915, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF VERDICT.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday; whereupon the jury empaneled herein come into Court and present to the Court the following verdict and recommendation, viz.: "We, the jury in the above entitled Court and cause, find the defendant, H. H. Riddell, guilty in manner and form as charged in count three of the indictment; and guilty in manner and form

as charged in count four of the indictment; and guilty in manner and form as charged in count five of the indictment. Dated at Portland, Oregon, this 26th day of January, 1916. E. M. Simonton, Foreman." "We, the undersigned jurors having found the verdict of guilty do hereby request and earnestly petition your honor to extend extreme leniency in the case above mentioned. E. M. Simonton, J. J. Kenney, G. A. Harth, J. G. Sleret, A. J. Monk, J. A. Ficke, Louis F. Hadley, George V. Bishop, J. A. Abrey, Wilson Fike, F. Joplin, W. B. Donahue." Which verdict and recommendation are received by the Court and ordered to be filed; whereupon on motion of said defendant **IT IS ORDERED** that he be and he is hereby allowed thirty days from this date within which to file a motion for new trial herein and that he be and he is hereby allowed ninety days from this date within which to prepare and submit a bill of exceptions.

And Afterwards, to-wit, on the 26th day of January, 1916, there was duly filed in said Court and cause, a Verdict, in words and figures as follows, to-wit:

VERDICT.

We, the jury in the above entitled Court and cause, find the defendant, H. H. Riddell, guilty in manner and form as charged in count three of the indictment; and

Guilty in manner and form as charged in count four of the indictment; and

Guilty in manner and form as charged in count five of the indictment.

Dated at Portland, Oregon, this 26th day of January, 1916.

E. M. SIMONTON, Foreman.

Filed January 26, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of January, 1916, there was duly filed in said Court and cause, the Recommendation of the Jury, in words and figures as follows, to-wit:

RECOMMENDATION OF THE JURY.

Hon. Judge Bean,

District Court of the United States,
District of Oregon.

In the case of United States

vs.

H. H. Riddell.

We, the undersigned jurors, having found the verdict of guilty, do hereby request and earnestly petition

your honor to extend extreme leniency in the case above mentioned.

E. M. Simonton
J. J. Kenney
G. A. Harth
J. G. Sleret
A. J. Monk
J. A. Ficke
Louis F. Hadley
George V. Bishop
J. A. Abrey
Wilson Fike
F. Joplin
W. B. Donahue.

And afterwards, to-wit, on Monday, the 20th day of March, 1916, the same being the 13th Judicial day of the regular March, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

JUDGMENT.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendant in his own proper person and by Mr. Wallace McCamant, of counsel; whereupon said plaintiff moves the Court for judgment upon the verdict of the jury heretofore filed herein:

It is, therefore, considered that said defendant do pay a fine of Two Thousand Five Hundred Dollars (\$2500.00), and that he be imprisoned in the county jail of Multnomah County, Oregon, for the term of four months, and it is further ordered that execution of this sentence be and the same hereby is stayed until the time allowed said defendant to file a bill of exceptions in this cause.

And afterwards, to-wit, on the 19th day of September, 1916, there was duly filed in said Court and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

Your Petitioner, H. H. Riddell, defendant in the above entitled cause, now comes and brings this his petition as plaintiff in error, for the writ of error to the District Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 20th day of March, 1916, there was rendered and entered in the above entitled cause a judgment in and by said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the county jail of the County of Multnomah, State of Oregon for a period of four months and to pay a fine of \$2,500.00.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the

records and proceedings at and in said cause in the rendition of said judgment and sentence to the great damage of your petitioner, said defendant, all of which errors will be made to appear by examination of the said record and more particularly by an examination of the bill of exceptions by your petitioner tendered and filed herein and in the assignments of error filed and tendered herewith.

To the end therefore that the said judgment, sentence and proceedings may be reversed by the United States Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law, and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignments of error and all proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any have happened, may be fully corrected, and full and speedy justice done your petitioner.

And your petitioner now makes his assignments of error filed herewith upon which he will rely, and which, will be made to appear by the return of said record in obedience to said writ.

Wherefore, your petitioner prays the issuance of a writ as hereinbefore prayed for, and prays that his assignments of error filed herewith may be considered as his assignments of error upon the writ, and that the

judgment rendered in this cause may be reversed and held for naught and said cause remanded for further proceedings, and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this Court against the said petitioner be suspended and stayed until the determination of the said writ of error in the said Circuit Court of Appeals.

E. B. DUFUR,
Attorney for Petitioner.

Filed September 19, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 19th day of September, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, defendant above named by his counsel, and presents this his assignments of error, containing the assignments of error upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause.

1. Error of the Court in overruling the demurrer of plaintiff in error to counts 3, 4 and 5 in the indictment.

2. Error of the Court in overruling the objection of defendant to and receiving in evidence the articles of incorporation of the Oregon Inland Development Company; Complainant's Exhibit No. 1.

3. Error of the Court in overruling the objection of the defendant to and admitting in evidence the record book of the corporation introduced as Complainant's Exhibits 2, 3, 4, 5, 6, 7, 8, 109, 110, 111, 112 and 114.

4. Error of the Court in overruling the objection of the defendant to and receiving in evidence the contract between John Veason and the Oregon Inland Development Company; Complainant's Exhibit 9.

5. Error of the Court in overruling the objection of the defendant to and receiving in evidence the letter of John Veason to the Oregon Inland Development Company af date March 23, 1910; Complainant's Exhibit No. 10.

6. Error of the Court in overruling the objection of the defendant to and admitting in evidence the contract between John Veason and the Oregon Inland Development Company of date April 14, 1910; Complainant's Exhibit No. 11.

7. Error of the Court in overruling the objection of the defendant to and receiving in evidence the pamphlet "The Land of Opportunity;" Complainant's Exhibit No. 12.

8. Error of the Court in overruling the objection of the defendant to the testimony of the witness Ella

O'Gara and in permitting the witness to answer the following question: Question, "The title of it was 'Success.' Now Miss O'Gara where was the literature, this pamphlet entitled 'Success,' where was it kept and in what quantities was it on hand at the time you went to work for them?" Answer: "It was on the counter and tables and floor, stacked all around and we were busy sending it out; that was when Miss McMahon first worked for us; she helped send it out; we first mailed a single copy to each inquirer and then later on there was a great quantity sent and then to agents; it was sent to them by mail and express."

9. The Court erred in overruling the objection of the defendant to and receiving in evidence the pamphlet "Success;" Complainant's Exhibit No. 13.

10. Error of the Court in overruling the objection of the defendant to the testimony of the witness Ella O'Gara wherein she was asked the following question: Question: "What have you to say as to whether or not Riddell knew that was being mailed out in these quantities and in that manner?" And in permitting the witness to answer. Answer: "He knew that we were sending literature out."

11. Error of the Court in overruling the objection of the defendant to and receiving in evidence the cancelled checks and bills; Complainant's Exhibit No. 14.

12. Error of the Court in overruling the objection of the defendant to and receiving in evidence the pamphlet "Progress;" Complainant's Exhibit 15.

13. Error of the Court in overruling the objection of the defendant to the testimony of the witness Ella O'Gara and in permitting the witness to answer the following question: Question: "Are the signatures true and correct representations of the signature of Mr. Riddell?" Answer: "Just like he writes."

14. Error of the Court in overruling the objection of defendant to and receiving in evidence; Complainant's Exhibit 16.

15. Error of the Court in overruling the objection of the defendant to and receiving in evidence the "Map of Oregon;" Complainant's Exhibit 17.

16. Error of the Court in overruling the objection of the defendant to and receiving in evidence the copy of the second issue of Success; Complainant's Exhibit 18.

17. Error of the Court in overruling the objection of the defendant to and receiving in evidence the paper, "Contract No. 516;" Complainant's Exhibit 25.

18. Error of the Court in overruling the objection of the defendant to and receiving in evidence the selling agent's contract of April 25, 1910; Complainant's Exhibit 26.

19. Error of the Court in overruling the objection of the defendant to and receiving in evidence the contract of November 18, 1910; Complainant's Exhibit 27.

20. Error of the Court in overruling the objection of the defendant to and receiving in evidence the publication, "Fruitdale;" Complainant's Exhibit 28.

21. Error of the Court in overruling the objection of the defendant to and receiving in evidence the publication entitled, "Famous Fruits;" Complainant's Exhibit 29; and further, in remarking in the presence and hearing of the jury, "It was gotten out by the general manager of the firm, a man employed by or whom Mr. Riddell assisted in employing according to the contract, and if in the proper scope of the employment I suppose some responsibility attaches to the employer." And further in remarking to the jury: "Mr. Riddell was one of the organizers, Director and Secretary of the concern, signed the contract and put a man in charge to carry out the purposes of the organization, if it was such as the Government claims and I don't think a man can do that and then escape responsibility, even criminal, if the evidence sustains that theory. That is a question for the jury of course."

22. Error of the Court in overruling the objection of the defendant to and receiving in evidence the pamphlet, "Coming to Oregon;" Complainant's Exhibit 30.

23. Error of the Court in overruling the objection of the defendant to and receiving in evidence the booklet entitled, "Grande Ronde District in Oregon;" Complainant's Exhibit 31.

24. Error of the Court in overruling the objection of the defendant to and receiving in evidence the poster; Complainant's Exhibit 32.

25. Error of the Court in overruling the objection of the defendant to and receiving in evidence the receipted bills and checks; Complainant's Exhibit 33.

26. Error of the Court in overruling the objection of the defendant to and receiving in evidence the contract of Mary C. Jackson; Complainant's Exhibit 38, and the contract of Mary C. Jackson; Complainant's Exhibit 39.

27. Error of the Court in overruling the objection of the defendant to and receiving in evidence the contract of H. W. Patton; Complainant's Exhibit 40.

28. Error of the Court in overruling the objection of the defendant to the testimony of the witness Fannie Dean and in permitting the witness to answer the following question: Question: "Now taking up the first one, No. 557, it is in favor of a Mr. E. H. Bryant, of Gallup, New Mexico, and the one 554 is in favor of J. K. Hartline, Albuquerque, New Mexico. Through what agency would that be transmitted to these gentlemen residing in those places?" And further in permitting the witness to answer said question as follows: "These clearance receipts were first prepared by me and then taken to Mr. Richet and Mr. Riddell for their respective signatures; after Mr. Richet had signed them and after Mr. Riddell had signed them they would then be mailed."

29. Error of the Court in overruling the objection of the defendant to the testimony of the witnesses E. W. Donnelly, Henry Ireland, Walter J. Jones, R. S. Shelly, J. E. Gribble, C. S. Congleton, J. W. Schmitz, W. A. Donnelly, G. C. Blake and G. C. Stevenson, wherein they testified that they had examined the lands described in the photographic copies of the deeds set

out in the two issues of "Success;" that said lands were in the high mountains many of them were on the tops of mountain peaks; they were arid, rocky, dry, cut up with gulches and deep ravines containing but a small amount of merchantable timber of poor quality; that on some of the tracts snow lies as late as August; that the lands were nearly all within the boundaries of the National Forests and were all absolutely worthless and unfit for any agricultural or horticultural use whatsoever, and further in receiving in evidence Complainant's Exhibits 21, 22 and 23.

30. Error of the Court in overruling the objection of the defendant to and receiving in evidence the letter of November 22, 1910, to S. I. Renshaw; Complainant's Exhibit No. 45.

31. Error of the Court in overruling the objection of the defendant to the testimony of the witness S. I. Renshaw wherein he testified that he had received a great number of copies of Complainant's Exhibits Nos. 13, 15, 28, 39, 31, 29, 18 and 17 and of the poster, and that he had used all of said literature in advertising the lands of the company and procuring auction contracts for the purpose of making sales.

32. Error of the Court in overruling the objection of the defendant to and receiving in evidence Complainant's Exhibits Nos. 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 and the testimony that all these exhibits had been receiving by the several witnesses through the agency of the United States mails.

33. Error of the Court in overruling the objection of the defendant to and receiving in evidence the clearance receipt of J. K. Hartline; Complainant's Exhibit No. 41.

34. Error of the Court in overruling the objection of the defendant to and receiving in evidence the clearance receipt of E. H. Bryant; Complainant's Exhibit No. 42; and further to the testimony of the witness E. H. Bryant that he had received the paper through the mail.

35. Error of the Court in overruling the objection of the defendant to and receiving in evidence Complainant's Exhibit No. 119.

36. Error of the Court in overruling the objection of the defendant to and receiving in evidence Complainant's Exhibit No. 122.

37. Error of the Court in overruling the objection of the defendant to and receiving in evidence, Complainant's Exhibits Nos. 128-A, and 128-B.

38. Error of the Court in giving the jury the following instruction:

‘If, therefore, you believe from the testimony in this case that there was an unlawful and illegal device or scheme to defraud by means of false and fraudulent representations set out in the indictment entered into between the defendant and Conway and Richet, or either of them, and that said scheme contemplated the use of the United States

mails in its accomplishment, then it can make no difference as far as defendant's guilt is concerned which one of the conspirators mailed the letters charged in the indictment, if they were mailed at all, or whether he knew that they were mailed or whether he had any knowledge of the contents thereof, if in fact they were mailed by one of the conspirators or associates in furtherance of the unlawful scheme or device to defraud to which defendant Riddell was a party and of which he had knowledge.'

39. Error of the Court in giving the jury the following instruction:

'It is enough if, having devised a scheme to defraud, the defendant, with a view to executing it, deposited or caused to be deposited in the post-office, letters or papers which were designed for the purpose of carrying it into effect, although in the judgment of the jury they may be wholly insufficient for that purpose; nor is it necessary for the government to prove the mailing of all of the letters set out in the indictment and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was mailed by the defendant or caused to be mailed by him, and that such letter or document was in fact intended by the parties mailing it in the execution of or to assist in the execution of the alleged unlawful scheme.'

40. Error of the Court in giving the jury the following instruction:

‘You must, therefore, before you can find the defendant guilty be satisfied beyond a reasonable doubt as I shall attempt to define that term to you hereafter that he devised or assisted to devise such scheme to defraud and that he or his co-conspirators placed or caused to be placed in the postoffice of the United States for mailing and delivery one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention for the purpose of executing such scheme. The intention of the defendant is the gist of the offense.’

41. Error of the Court in giving the jury the following instruction:

‘If there was a fraudulent scheme or device entered into by Richet or Conway or either of them for the purpose of obtaining money or property by false or fraudulent representations, and Riddell was a party thereto, with knowledge of its fraudulent character, then under the statute he was guilty as a principal if the mails were subsequently used as charged in the indictment, and in furtherance of such purpose.’

42. Error of the Court in giving the jury the following instruction:

‘It does not necessarily follow from the fact that a man has a good reputation for honesty and in-

tegrity that he actually possesses these traits of character, and the mere possession of such reputation does not render the person possessing it incapable of committing a crime involving dishonesty and want of integrity. It is within the common knowledge of us all that many persons bearing good reputations have nevertheless been guilty of crime. While the reputation of the defendant for honesty and integrity is for your consideration as a part of the evidence in this case, it is entitled to just the weight, no less and no more, which you, upon a review of all the evidence in the case, and in the exercise of sound judgment, would attach to it, and you should give it such weight as you think it is entitled to under all the circumstances of the case.'

43. Error of the Court in giving the jury the following instruction:

'If you find from the evidence and beyond a reasonable doubt that there was a scheme and artifice to defraud substantially the same as it is set out in the indictment, and that the defendant, H. H. Riddell, was a party thereto, and that it was a part and portion of this scheme and artifice to defraud that the representations contained in the literature of the company were made with the knowledge of the defendant, Riddell, and that these representations were knowingly false, then the intent to injure and to defraud the auction contract holders of the Oregon Inland Development Company, upon the part of the said Riddell, may be by

you presumed; acts which involve such consequences when knowingly and wrongfully committed establish not only a guilty intent to injure and defraud, but they disclose moral turpitude utterly inconsistent with an innocent intent.'

44. Error of the Court in giving the jury the following instruction:

'It is presumed that every sane person intends the natural and ordinary consequences of his own voluntary act. Applying this rule to the case at bar, if you should find from the evidence and beyond a reasonable doubt that the defendant was a party to the scheme and artifice to defraud set out in the indictment, if you should find that there was such scheme or artifice, and that in the execution of said scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in count three of the indictment, or the certificate set forth in count four of the indictment at the time and place designated in the indictment, then you should find the defendant, Riddell, guilty upon said counts.'

45. Error of the Court in refusing to give the jury the following instruction:

'The jury is instructed to find the defendant not guilty of the charge set forth in count three of the indictment.'

46. Error of the Court in refusing to give the jury the following instruction:

‘The jury are instructed to find the defendant not guilty of the charge set forth in count four of the indictment.’

47. Error of the Court in refusing to give the jury the following instruction:

‘The jury is instructed to find the defendant not guilty of the charge set forth in count five of the indictment.’

48. Error of the Court in refusing to give the jury the following instruction:

‘There is no charge in the indictment that a fraud was committed in the manner in which the stock of the Oregon Inland Development Company was treated as paid up. The jury will therefore disregard the contention of the District Attorney that this circumstance was fraudulent.’

49. Error of the Court in refusing to give the jury the following instruction:

‘The jury is instructed that the defendant can not be found guilty under the third count in the indictment unless the jury shall find that the defendant, mailed or caused to be mailed, a certain letter of date June 26, 1911, signed Oregon Inland Development Company, J. T. Conway, Vice-President and General Manager, addressed to W. C. Hayward, Manila, Iowa, which letter is set forth in the third count of the indictment.’

50. Error of the Court in refusing to give the jury the following instruction:

‘The jury is instructed that the defendant can not be found guilty under the fourth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate dated June 9th, 1911, in favor of E. H. Bryant, of Gallup, New Mexico, which certificate is set forth in the fourth count of the indictment.’

51. Error of the Court in refusing to give the jury the following instruction:

‘The jury is instructed that the defendant can not be found guilty under the fifth count in the indictment, unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate of date May 29, 1911, in favor of J. K. Hartline of Albuquerque, New Mexico, which certificate is set forth in the fifth count of the indictment.’

52. Error of the Court in refusing to give the jury the following instruction:

‘It appears from the Government’s proof that prior to May 23rd, 1911, the Oregon Inland Development Company ceased and abandoned its efforts to market the property which has been known in the testimony as the Veason Lands and that all acts looking to the marketing of these properties had ceased more than three years prior to the time when the defendant was indicted. The jury is

therefore instructed to disregard all testimony, if there is any in the record, tending to show any efforts and things done by the defendant looking to the sale of the Veason Lands.'

53. Error of the Court in refusing to give the jury the following instruction:

'It appears from the testimony of the Government that all efforts looking to the marketing of the Veason Lands were abandoned prior to the 23rd day of May, 1911. The jury is therefore instructed that a verdict of guilty cannot be based on evidence of anything done by the defendant looking to the marketing of the Veason Lands.'

54. Error of the Court in refusing to give the jury the following instruction:

'The acts set up in the indictment are charged in the indictment as having been done on certain dates therein set forth. The Government is not confined in its proof to the dates set forth in the indictment, but it is bound under the statute of limitations to prove that the acts of the defendant on which a conviction is asked took place within three years prior to the finding of the indictment. Unless you can find from the evidence beyond a reasonable doubt that subsequent to the 23rd day of May, 1911, the defendant was a party to the fraudulent scheme and device set up in the indictment and that subsequent to that date he took some active step to effectuate the fraud therein

charged and that he mailed one or more of the writings heretofore specified in the charge of the Court subsequent to May 23, 1911, you will find the defendant not guilty.'

55. Error of the Court in refusing to give the jury the following instruction:

'It is by no means unusual for advertisers to exaggerate the merits of those things which they offer for sale and such exaggeration is not criminal unless it is in bad faith. In order to be entitled to a conviction based on the literature circulated by the Oregon Inland Development Company, the Government must show that the defendant caused this literature to be circulated, knowing that the statements contained in it, or some of them, were false in fact, and that he did this with intent to deceive and to induce those receiving the literature to part with their money or property. The Government must further prove that such misrepresentations were material.'

56. Error of the Court in refusing to give the jury the following instruction:

'The future is always a matter of speculation and opinion. The representations therefore which are sufficient to sustain a charge of fraud must relate to something in the past or the present. The jury is therefore instructed to disregard any statements in the literature of the Oregon Inland Development Company as to the future of the prop-

erties offered for sale or as to any future events affecting their value.'

57. Error of the Court in refusing to give the jury the following instruction:

'The value of land is always a matter of opinion and for that reason a statement as to the value of land cannot form the basis of a charge of fraud under the circumstances of this case.'

58. Error of the Court in refusing to give the jury the following instruction:

'If the defendant believed the representations of the Oregon Inland Development Company with reference to the value of its lands to be true, he is entitled to an acquittal.'

59. Error of the Court in refusing to give the jury the following instruction:

'The jury has already been instructed that good faith is an adequate defense against the charge preferred in the indictment and on this branch of the case the jury is entitled to take into consideration the question of whether or not there was any motive moving the defendant to participate in the fraudulent scheme or artifice set forth in the indictment.'

60. Error of the Court in permitting the jury to take with them into the jury room the corporation record book, Complainant's Exhibits, Nos. 2, 3, 4, 5, 6, 7, 8, 109, 111, 112 and 114; and the literature and exhibits

relating solely to the Veason Lands, and particularly the copies of "Success."

Wherefore defendant, plaintiff in error, prays that the above and foregoing Assignments of Error be considered as his Assignments of Error upon the Writ of Error; and further prays that the judgment heretofore rendered in this cause may be reversed and held for naught and that plaintiff in error, defendant above named have such other and further relief as may be in conformity to law and the practice of the Court.

E. B. DUFUR.

Attorney for Defendant and Plaintiff in Error.

Filed September 19, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Tuesday, the 19th day of September, 1916, the same being the 67th judicial day of the regular July, 1916, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OF ERROR.

Now at this day, this cause coming on to be heard on the motion of the defendant H. H. Riddell, for a Writ of Error, and it appearing to the Court that a Petition for a Writ of Error, together with Assignments of Error, have been duly filed; it is ordered that a Writ of Error be and is hereby allowed to have reviewed in

the United States Circuit Court of Appeals, Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and the same is hereby fixed at Two Thousand Five Hundred Dollars, and that execution of sentence be stayed pending the prosecution of said Writ of Error.

CHAS. E. WOLVERTON,

Judge.

Filed September 19, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 20th day of September, 1916, there was duly filed in said Court and cause, a Bond on Writ of Error, in words and figures as follows, to-wit:

BOND ON WRIT OF ERROR.

Know All Men by These Presents: That we, H. H. Riddell, the above named defendant, as principal, and S. T. Lockwood and Eugenia Morse, as sureties, are held and firmly bound unto the United States of America in the penal sum of Two Thousand Five Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors, administrators, forever, firmly by these presents. Sealed with our seals and dated this 19th day of September, 1916.

Whereas, at the March term, 1916, of the District Court of the United States for the District of Ore-

gon, in a cause therein pending wherein the United States was plaintiff and the said H. H. Riddell was defendant, a judgment was rendered against the defendant on the 20th day of March, 1916, wherein and whereby the said defendant was sentenced to be imprisoned in the County jail of Multnomah County, Oregon, for four months and to pay a fine of \$2500.00, and the said defendant has sued for and obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment and sentence in the aforesaid action and a citation directing the United States to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of this obligation is such that if the said H. H. Riddell shall appear either in person, or by attorney in the said Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for a hearing of said cause in said Court and prosecute his Writ of Error and abide by the orders made by said United States Circuit Court of Appeals and shall surrender himself in execution as said Court may direct, if the judgment and sentence against him shall be affirmed, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 19th day of September, 1916.
In the Presence of

H. H. RIDDELL,
S. P. LOCKWOOD,
EUGENIA MORSE.

State of Oregon,
County of Multnomah,—ss.

We, S. P. Lockwood and Eugenia Morse, each being duly sworn, say, that I am a resident and free-holder in the State of Oregon, and that I am worth the sum of \$5,000.00 over and above all my just debts and liabilities and exclusive of property exempt from execution.

S. P. LOCKWOOD,
EUGENIA MORSE.

Subscribed and sworn to before me this 19th day of September, 1916.

(Seal)

E. B. DUFUR,
Notary Public for Oregon.

My commission expires January 15, 1917.

Approved this 20th day of September, 1916.

CHAS. E. WOLVERTON,
Judge.

Filed September 20, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 19th day of September, 1916, there was duly filed in said Court and cause, a Bill of Exceptions, in words and figures as follows, to-wit:

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled cause came on for trial in the District Court of the

United States for the District of Oregon on January 13, 1916, before the Honorable R. S. Bean, Judge, and a jury impaneled to try the cause, the Government appearing by Clarence L. Reames, United States Attorney, and the defendant appearing in person and by Wallace McCamant and E. B. Dufur, his counsel.

Whereupon, the opening statements having been made by counsel to the jury, the following proceedings were thereupon had:

The Government, to substantiate the issues on its part, offered in evidence a certified copy of the Articles of Incorporation of the Oregon Inland Development Company, and a certified copy of the Certificate of Incorporation of said company.

MR. McCAMANT: We object to the paper, may it please your Honor, on the ground that it appears these papers were executed on the 13th day of November, 1909, and filed the same date. The indictment was found on the 23d day of May, 1914, and the statute of limitations has therefore run in favor of the defendant as to anything which would be predicated on the making of the Articles of Incorporation in 1909.

COURT: The Government has a right to go back of the statute of limitations in developing the case, but of course must bring it within the three years of limitation and must confine the testimony to matters arising within three years.

MR. McCAMANT: Save an exception, and may my objection be considered as going to anything the Government offers prior to the 23d day of May, 1911?

COURT: Yes, if based upon the ground that it is covered by the statute of limitations.

MR. McCAMANT: Yes. I will of course offer any other objections, and I may be considered, of course, to have an exception to the court's rulings as against that objection.

Complainant's Exhibit 1, Articles of Incorporation, read to the jury."

Whereupon, J. H. Upton, an attorney at law, called as a witness on behalf of the Government, testified that he was acquainted with the defendant Riddell during the years 1909, 1910 and 1911. He identified the corporation record book as the minute book of the Oregon Inland Development Company, which showed the records of the meetings of the stockholders and the Board of Directors. At the organization of the company the record was kept by the witness. The minutes of the first meeting and the By-Laws, the first meeting of the stockholders and the By-Laws of the company were put into the book by the witness, who was the attorney for the company at the time of its organization.

"MR. REAMES: Will the defense require further proof?

MR. McCAMANT: We admit, Mr. Reames, that everything in that book is a corporate record of a cor-

porate action. We admit that that book is the book which, at the inception of the corporation, was used for corporate purposes.

MR. REAMES: Well, then may it be introduced with the understanding that either party may read from such portions of it as desired from time to time during the course of the trial, and that these entries as they are read will be subject to any parol explanation that either side desires to make?"

Whereupon the following pages of the minute book of the corporation were admitted by the defendant to be either in the hand writing of the defendant or to have been prepared and signed by him, and these pages were then by the Government offered in evidence. To the introduction of these pages of the minute book the defendant objected as not connecting the defendant with the crime charged in the indictment, and for the further reason that more than three years had elapsed prior to the finding of the indictment, and as incompetent, irrelevant and immaterial. The objection was overruled and the defendant duly excepted to the ruling. Whereupon the said respective pages of the minute book were received in evidence and marked as follows:

Page 1, as Complainant's Exhibit Two.

Page 3, as Complainant's Exhibit Two.

Page 4, as Complainant's Exhibit Two.

Page 5, as Complainant's Exhibit Three.

Pages 5, 6, 7 and 8, as Complainant's Exhibit Three.

Page 9, as Complainant's Exhibit Four.

Pages 11, 12 and 13, as Complainant's Exhibit Five.

Pages 14 and 15, as Complainant's Exhibit Six.

Pages 16, 17, 18 and 19, as complainant's Exhibit Seven.

Pages 21 and 23, as Complainant's Exhibit Eight.

Page 24, as Complainant's Exhibit One Hundred Nine.

Page 25, as Complainant's Exhibit One Hundred Ten.

Page 26, as Complainant's Exhibit One Hundred Eleven.

Page 27, as Complainant's Exhibit One Hundred Twelve.

Pages 27 and 28, as Complainant's Exhibit One Hundred Twelve.

Page 32, as Complainant's Exhibit One Hundred Thirteen.

Pages 33, 34, 35 and 36, as Complainant's Exhibit One Hundred Fourteen.

The witness was one of the first directors, and the first treasurer of the corporation.

A contract between the Oregon Inland Development Company and John Veasen was identified by the witness and its execution proved by him. The Government offered the contract in evidence.

The defendant objected to the contract for the reason that more than three years had elapsed prior to the finding of the indictment and after the contract had been terminated and the sale of the Veasen lands discontinued. The objection was overruled. To the ruling the defendant duly excepted and the exception was allowed. The contract was then received in evidence and read to the jury and marked as Complainant's Exhibit Nine. This is a contract of date November 24, 1909, signed by John Veasen, and by the Oregon Inland Development Company, by F. Richet, President, and H. H. Riddell, Secretary, and witnessed by J. H. Upton and W. Mar-killie.

The witness further testified that the first page of the minute book, constituting the subscriptions to the capital stock, showed the correct name of the subscriber and the subscription to the stock that had been made, and that the subscriptions were shown in the original handwriting of the different subscribers.

Upon cross examination, the witness testified that the relation he and Mr. Riddell sustained to the undertaking was the relation of lawyers organizing a corporation, who took their pay in stock instead of in money; that during the time the witness was familiar with the affairs of the corporation, Riddell did not exercise any executory authority over the acts of the company, but that Mr. Richet and Mr. Conway were the managers of the company, and that Mr. Riddell took part at the meetings of the directors, and in that way, of course he did,

but not to any other extent within the knowledge of the witness; that Mr. Richet and Mr. Conway ran the company and were the executive officers of the company; that the witness was not familiar with the affairs of the company, or Riddell's connection therewith, subsequent to March 9, 1910; that up to the time Mr. Conway came in, on March 9, 1910, it had not transacted very much business.

W. Markillie, a witness called on behalf of the Government, testified that he had lived in Portland for twenty years, and that during that period of time was in the real estate business; that he was acquainted with John Veasen and that John Veasen was now dead. The witness identified Complainant's Exhibit Nine, and also identified an instrument bearing date March 23, 1910, addressed to the Oregon Inland Development Company, and stated that it was a letter written by John Veasen to the company, which cancelled the former contract.

Whereupon the Government offered the letter in evidence, to the introduction of which the defendant objected upon the ground that the defendant was not connected with the instrument in any way. The objection was overruled and the defendant asked and was allowed an exception, the Government stating at the time of the offer that it would show that thereafter a new contract was entered into by the Oregon Inland Development Company with John Veasen and that the second contract was signed by the defendant as an officer of the company for the same identical tracts of land. The

document was received in evidence and marked as Complainant's Exhibit Ten.

The witness identified an instrument bearing date April 14, 1910, and proved that it had been executed by Mr. Veasen, by Mr. Richet and by Mr. Riddell, in the presence of the witness.

Whereupon the contract was offered in evidence, to which the defendant objected upon the ground that it was incompetent, irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. The document was received in evidence and marked as Complainant's Exhibit Eleven.

The witness identified a pamphlet entitled "The Land of Opportunity," examined it and stated that it was a pamphlet used by the company in the exploitation of the Veasen lands; that before the pamphlet was circulated it was submitted to Mr. Riddell and to Mr. Upton, and that after it had been so submitted it was used and circulated in the exploiting of the Veasen lands by the company. Mr. Riddell and Mr. Upton passed upon it, but Mr. Byrne, one of the other promoters, was the man who decided that it was to be sent out.

Thereupon the publication "Land of Opportunity" was offered in evidence. The defendant objected for the reason that it related only to the Veasen lands, and that the contract for their sale had terminated and the sale thereof had stopped more than three years prior to the finding of the indict-

ment, and that the publication did not connect the defendant with the crime charged in the indictment. The objection was overruled, the defendant excepted and the exception was allowed. The paper was then received in evidence and marked as Complainant's Exhibit Twelve.

Upon cross examination the witness testified that when Complainant's Exhibit Twelve had been exhibited to Mr. Riddell, that it was simply exhibited to him as the attorney for the company and that in the opinion of the witness Riddell knew nothing concerning the Veasen lands except what information he got from either Veasen or the witness; that Riddell sustained to the company the relations of an advisory lawyer and that was all; however, at the time Complainant's Exhibit Twelve was submitted to Riddell, Riddell said that these lands were not cultivated and that Webster's definition of a farm would convey the idea that it was plowed land, and that they were no farms anyway; that they were tracts; that they couldn't be advertised for farms; that from his knowledge of the condition of the lands, it would be better to advertise them as tracts because they were not farms; that Riddell objected to the circulation of the literature with the word "farm" in it, and as he was the attorney for the company, this was subsequently changed; that is, the word "farm" was changed to the word "tract"; that all Mr. Riddell objected to in the literature was the use of the word "farm," and that the witness knew of no other objection that he made; that Mr. Riddell had the literature in his hands for some time and that after perusal some corrections were made, but

that the chief correction was to change the word "farm" to the word "tract."

Graham Dukhert, Assistant Cashier of the Lumbermens National Bank, testified that in the years 1909 and 1910 he handled all of the escrows for the bank; that during these years a great number of deeds were deposited with him by John Veasen. They were not accepted by the bank as escrows and were afterwards taken away from the bank by John Veasen. The witness did not know Riddell and Riddell did not contract any business with the bank on behalf of the corporation or John Veasen.

Ella O'Gara, an experienced stenographer and bookkeeper, testified that she began to work as a stenographer and bookkeeper for the Oregon Inland Development Company in the latter part of April, 1910; that the officers of the company were Frank Richet, President, H. H. Riddell, Secretary, Jay Upton, Treasurer, and J. T. Conway, General Manager. The offices of the company were located in the Chamber of Commerce Building, at Portland, Oregon, at the time she first went to work for the company, and during that time the law office of the defendant was in the same building. The witness did all the stenographic and bookkeeping work for the company during the time she was employed by it, with the exception that another stenographer was upon one occasion hired for two days. The volume of business transacted by the company in relation to the mailing and the receiving of letters, and the receipt of money, was large and there were a great many inquiries

which came to the office of the company relative to the sale of its lands. "The first day I went to work for the company Mr. Conway read to me the names of the officers of the company and told me with whom I would have dealings. The next day I saw Mr. Riddell and Mr. Upton. They were in the office of the company for several days. They were in and out a great deal. At the time I first went to work for the company, they were sending out a circular through the United States mails—a publication entitled "Success."

Q. The title of it was "Success." Now, Miss O'Gara, where was the literature, this pamphlet entitled "Success"—where was it kept and in what quantity was it on hand at the time you went to work for them?

Mr. McCamant: I object to that. They can't convict a man on a criminal charge on the assumption that he saw literature because of the fact that it was lying around in observation in the office. They can't charge him with responsibility on that character of testimony.

COURT: I don't know what the testimony will lead up to. It is a preliminary question as I understand it.

Mr. McCamant: Save an exception.

A. It was on the counter and tables, floor, stacked all around, and we were busy sending it out. That is when Miss McMahon first worked for us. She helped send it out."

"We first mailed a single copy to each inquirer and then later on there was a great quantity sent, and then

to agents it was sent both by mail and express. There were approximately between four and five thousand copies of this publication in the office, on the table, upon the counter and upon the floor. Mr. Riddell was in the office of the Oregon Inland Development Company during that period of time sometimes every day, sometimes not for several days; sometimes he would be in twice a day, and then maybe not again for a week. Mr. Riddell saw us mailing the copy of the publication entitled "Success" and saw us addressing it and sending it through the mails."

Whereupon the Government offered in evidence the first publication of "Success."

Mr. McCamant: We object to it on the ground that it is a departure from the allegations of the pleadings; no contention made in the pleadings Mr. Riddell mailed this, nor is there any evidence that he mailed it; it is immaterial for that reason. He can't be charged with responsibility for it even though the evidence might justify an inference that he knew about it.

COURT: There are two things that the government must prove in this case: First, that there was a scheme to defraud. That is the preliminary question. And second, that the mails of the United States were used in furtherance of such scheme. The indictment alleges a particular scheme and this is evidence bearing upon that question.

Mr. Reames: That is the purpose for which it is offered.

Mr. McCamant: Then your Honor does not rule that they can establish the use of the mails by defendant except on the five charges.

COURT: These are all matters they have charged in the indictment and that they will have to prove. They will have to prove first there was a scheme to defraud, and second that the mails were used as alleged in the indictment in furtherance of such scheme.

Mr. McCamant: So that this is admitted only as to the first branch of the government's case, and your Honor does not rule at this time at any rate that it can introduce as to the second branch of their case anything except the five pieces of mail referred to in the indictment.

COURT: No.

Mr. McCamant: Save an exception.

Pamphlet "Success" marked Complainant's Exhibit Thirteen, and read to the jury."

"Q. Subsequent to this piece of advertising literature, to whom were all of the rest of the advertising literature submitted of the Oregon Inland Development Company, until say the month of October, 1910? To whom was it submitted before it went out through the mails?

A. Well, I believe they began sending it out through the mail right away, and then as Riddell would come in they would show it to him.

Q. Who would show it to him?

A. Mr. Conway as a rule."

The witness then identified a publication entitled "Progress" as a piece of the advertising literature of the Oregon Inland Development Company, and which had been by the company sent out to the people through the mails. The witness then identified cancelled check No. 60, of date July 30, 1910, drawn upon the Merchants National Bank in favor of the Holly Press for \$130.00, the defendant admitting that the check was signed by H. H. Riddell, Secretary, and by F. Richet, Treasurer, and that it was paid by the bank in the ordinary course of business. The witness identified two receipted bills attached to the check, one in the amount of \$30.00 and the other in the amount of \$100.00, as being receipted bills for the issue of "Progress," and testified that the check was drawn and issued in payment of the bill for said publication; that every one of the contract holders received through the mail a copy of "Progress," and that a copy was mailed to every person who inquired, or any prospect who would come. These copies were generally sent through the mails, but were forwarded to the agents by express.

"Q. What have you to say as to whether or not Riddell knew that that was being mailed out in these quantities and in that manner?

Mr. McCamant: I object on the ground that knowledge is immaterial. They have to show that defendant caused matters to be mailed. He can't be convicted criminally on knowledge of what is going on.

COURT: As I said this morning, this is attempting to prove the fraudulent scheme.

A. He knew that we were sending literature out.

Mr. McCamant: Save an exception.

Whereupon the Government offered in evidence the cancelled check and the two receipted bills, to the introduction of which the defendant objected on the ground that it was incompetent, irrelevant and immaterial. The objection was overruled and an exception was allowed. Whereupon the cancelled checks and the two receipted bills were received in evidence and marked as Complainant's Exhibit Fourteen.

Whereupon the Government offered in evidence the copy of the publication identified by the witness and entitled "Progress"; the defendant objected on the ground that it was incompetent, irrelevant and immaterial, and that it does not show any connection of the defendant with any conspiracy, the testimony of the witness being that these papers were prepared by somebody else and started to be mailed and after that shown to the defendant; the objection was overruled and an exception was allowed; whereupon the publication was received in evidence and marked as Complainant's Exhibit Fifteen.

Whereupon the witness was shown the original of a letter, of date May 14, 1910, written upon the stationery of the Oregon Inland Development Company, addressed to Riley L. Walcott, at Winslow, Arizona, signed with

the stamped signature of H. H. Riddell, as Secretary of the Oregon Inland Development Company. She was also shown fifty other copies of this form letter, all of which were exactly the same with the exception of the date and the name and the address of the addressee. The first of these was dated May 14, 1910, and the last December 23, 1910. The witness identified these as circular letters that she had sent out in acknowledgment of the first payment when a contract holder would buy a new contract. Concerning this form letter, the witness testified:

“This is a mimeograph letter, a circular made all ready, so all we had to do was to fill in the amounts and the date. We filled in the name and the address, the date and the amounts, and then it was ready to mail. Upon this form, the total payment to be paid was \$150.00. From the time I went to work for the Oregon Inland Development Company up until October, 1910, this was the method by which the receipt of the first payment was acknowledged and information given as to when the next payment would fall due. Mr. Riddell sat behind me several times and watched me filling these forms in so he naturally knew they would be mailed. The signature to the form letter is the stamped signature of Mr. Riddell.

Q. Well, are the signatures true and correct representations of the signature of Mr. Riddell?

A. Just like he writes.

Mr. McCamant: I object to that. The question should be whether he authorized the use of the stamp or other device. I move to strike out the answer.

COURT: Objection overruled. I don't think a man can assume the duties of the office of secretary and allow the literature to go out with his name signed to it without some inference being drawn against him. I don't know just what. It is at least for the jury to pass upon.

Exception saved.

During the time these receipts were being sent out Mr. Riddell knew that that receipt was being sent out over his signature. It was sent out through the United States mails and was mailed in the Postoffice at Portland, Oregon.

Mr. Reames: Government now offers in evidence but one of these forms. I don't care to put the whole fifty-one in, and I will say at the time of making the offer, that we will supplement that later in the trial by proof that several of them, of this identical form, were actually received by people who purchased applications, and received at their postoffice addresses through the medium of United States mail. It is offered simply for the purpose of proving a fraud and proving scheme and artifice to defraud and to connect the defendant therewith.

Mr. McCamant: I object, as incompetent, irrelevant and immaterial. There is nothing in the letter itself which involves any artifice to defraud. It is not one of the letters described in the indictment, and the question of its mailing is therefore wholly immaterial; and it appears that they were sent out by some one else and all

that has been proved or attempted to be proved is knowledge by the defendant and nothing casual on his part.

Objection overruled, exception saved.

Marked Complainant's Exhibit Sixteen, and read."

The witness thereupon identified a piece of literature entitled "Map of the State of Oregon" as a part of the advertising literature of the Oregon Inland Development Company, and testified that she had mailed it out to nearly every contract holder up until October, 1910; that this piece of literature was sent out in large quantities, purchased in large amounts and sent out to every prospective contract holder; that Mr. Riddell knew they were sending out this piece of advertising literature.

Whereupon the Government offered in evidence the publication entitled "Map of the State of Oregon," to which the defendant objected upon the ground that it was irrelevant and immaterial, and on the ground that there is no evidence to show that the defendant caused it to be sent out. The objection was overruled and an exception was asked and allowed. The publication was then received in evidence and marked as Complainant's Exhibit Seventeen.

Whereupon the witness identified a piece of advertising literature as the second issue of "Success," issued, printed and mailed by the Oregon Inland Development Company after the witness had gone to work for the company. She also identified a check signed by the Oregon Inland Development Company and by Richet, as

President, and Riddell, as Secretary, which she testified was the check which paid for the publication. She testified that Mr. Riddell knew of the mailing of this piece of literature on account of certain changes therein which were talked over at times when he was present. The witness mailed between five and ten thousand of this publication to the contract holders, through the medium of the United States mails.

“Mr. Reames: Government offers in evidence second issue of “Success.”

Mr. McCamant: I object on the ground of incompetent, irrelevant and immaterial, and no responsibility shown for the mailing of it by the defendant. The defendant did nothing so far as the evidence shows to cause it to be mailed; and upon the ground that there is no charge in the indictment that the paper was mailed.

COURT: As I have ruled two or three times, that is not the question now. The question now is whether the Government is able to prove there was a scheme to defraud. That is one question, the first one; the second is whether Mr. Riddell was a party to it, if there was such a scheme, and third, if to further this scheme, the mails were used. And this is on the first two as I understand, and for that reason is competent. Especially in view that Mr. Riddell was consulted about the changes made before.

Exception saved.

Mr. McCamant: I don't like to be taking objections after the court has ruled. May I have a general excep-

tion to any testimony as to the mailing of anything further than the papers set out in the indictment?

COURT: Certainly."

Whereupon the second issue of "Success" was received in evidence and marked as Complainant's Exhibit Eighteen.

Whereupon the witness identified a contract of date March 11, 1910, as having been executed by J. T. Conway as party of the first part, and Oregon Inland Development Company, as party of the second part, and as having been signed by J. T. Conway and by F. Richet and H. H. Riddell. The witness proved the execution of the contract.

Whereupon the contract was offered in evidence and marked as Complainant's Exhibit Nineteen.

The witness further testified that it was the business of Mr. J. T. Conway, the general manager, to do most of the letter writing; that during all of the times concerning which the witness had testified, the offices of the company were maintained in the Chamber of Commerce Building, in Portland, Oregon, and that Riddell was the secretary of the company during all of that time; that the witness continued to act as stenographer and bookkeeper of the company until the last of April, 1911, and that during the month of May, 1911, she took care of the books at night. Miss Fannie Yost took her place as stenographer and bookkeeper when she left. The witness thereupon identified four bulletins as mimeo-

graph circular letters issued by the Oregon Inland Development Company for the purpose of raising the price of auction contracts to \$300, and testified that these bulletins were sent out through the United States mails; that the signatures upon the bottom of the bulletins are exact reproductions of the signatures of Frank Richet, President, H. H. Riddell, Secretary and John T. Conway, General Manager. The witness further testified that she did not know whether or not Mr. Riddell had any knowledg of the mailing of any of these bulletins; that prior to the time that these bulletins were mailed, the Oregon Inland Development Company was selling auction contracts exclusively upon the lands known as the Veasen lands; she further testified that Mr. Riddell was consulted relative to the raising of the price and that during October and November, 1910, one of these bulletins was mailed to every contract holder.

Whereupon one of the bulletins was offered and received in evidence and read to the jury. It was marked as Complainant's Exhibit Twenty-four.

Whereupon the witness identified contract No. 516, issued by the Oregon Inland Development Company as having been signed by H. H. Riddell, as Secretary, and F. Richet, as President of the Oregon Inland Development Company. The contract bears date of December 14, 1909.

"Mr. Reames: I offer in evidence.

Mr. McCamant: I object your Honor, on the grund that the opening statement of the district attor-

ney shows that this contract and other contracts of this character were called in and new contracts substituted for them long prior to the 23d of May, 1911, and that therefore, this evidence is inadmissible as tending to charge the defendant with any complicity with anything which took place within three years.

COURT: Very well, part of the transaction.

Mr. Reames: You don't object on the ground I haven't proved the genuineness of their signatures?

Mr. McCamant: No, I don't care about that, but I take exception to the court's ruling.

Marked Complainant's Exhibit Twenty-five and read to the jury."

The witness testified that she was acquainted with an agent of the company by name of S. I. Renshaw, who lived in Oklahoma. She identified the signatures appearing upon the selling agent's contract of date April 25, 1910. She testified that the signature of H. H. Riddell had been placed upon the contract by the use of a rubber stamp.

Whereupon the contract was offered in evidence, was objected to by the defendant upon the ground that it is incompetent in that the signature of Mr. Riddell has not been proved, being merely a stamp put there, and on the ground that it is irrelevant and immaterial and not tending to support any issues. The objection was overruled and an exception allowed. The document was received in evi-

dence and marked as Complainant's Exhibit Twenty-six.

The witness identified a contract of date November 18, 1910, and identified the signatures of F. Richet, President, H. H. Riddell, Secretary and J. T. Conway appended to the document. The signatures were admitted to be genuine.

Whereupon the Government offered the contract in evidence, to which the defendant objected on the ground that it was irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. The document was received in evidence and marked as Complainant's Exhibit Twenty-seven.

The witness testified that in November, 1910, the company quit selling the lands known as the Veasen lands and began to sell other lands situated within Union County, Oregon; she identified a piece of advertising literature entitled "Fruitdale" as part of the advertising literature of the Oregon Inland Development Company. She testified that this piece of literature was sent out through the United States mails to the prospects and old contract holders, and that it was sent out right after the company had changed to selling the lands within Union County and had quit selling the Veasen lands; that this piece of literature entitled "Fruitdale" was the first piece of literature issued by the company after the change; that this advertising literature was sent out in quantities of between five and ten thousand and that Mr. Riddell knew that they were mailing out literature

on the Grand Ronde valley; that Riddell was in the office of the Oregon Inland Development Company quite often while the literature was being mailed out and that the literature was kept on a big table with the exception of one package that was not broken; that there was always a package of the literature open out in the main office.

Whereupon the Government offered in evidence the piece of literature entitled "Fruitdale," to which the defendant objected on the ground that the Government has not sufficiently shown the responsibility of the defendant for its issue, and on the ground that it is irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. The publication was received in evidence and marked as Complainant's Exhibit Twenty-eight.

The witness identified a piece of literature entitled "Famous Fruits" as part of the literature advertising Union and Wallowa counties, and as having been issued by Mr. Conway and having been prepared by him; that she did not believe that this piece of literature was submitted to Mr. Riddell although they had talked over the advisability of publishing or issuing a map; that the reading matter was not submitted to Mr. Riddell but that the map contained in the exhibit was exhibited to him; that this publication was sent out by the company through the mails to every contract holder and to prospects, and also to all the agents.

Whereupon the Government offered the publication entitled "Famous Fruits" in evidence.

Mr. McCamant: I object to the whole paper on the ground it is irrelevant and immaterial, and I object to everything other than the map on the ground that the government's own evidence shows that the defendant was not responsible for it.

COURT: The objection will be overruled on two grounds. First, it is part of the Government's case in showing that there was a fraudulent scheme. Therefore it is competent. Second, it was gotten out by the general manager of the firm, a man employed by or whom Mr. Riddell assisted in employing according to the contract, and if in the proper scope of the employment I suppose some responsibility attaches to the employer and I think is competent.

Mr. McCamant: If your Honor's mind is firmly fixed on that last proposition, I don't want to discuss what is determined upon, but it is certainly contrary to all my ideas that there can be criminal responsibility of the officers of a corporation for the lapses of a man whom they have employed, without showing they are familiar with what he is doing and approved of it.

COURT: But the evidence in this case up to this time indicates that this concern was organized for a purpose the Government claims is fraudulent, and that was the object and purpose they had in

view. Mr. Riddell was one of the organizers, director and secretary of the concern, signed the contract to put a man in charge, to carry out the purposes of the organization, and if it was such as the Government claims, and I don't think a man can do that and then escape responsibility, even criminal, if the evidence sustains that theory. That is a question for the jury, of course.

Exception saved, paper marked Complainant's Exhibit Twenty-nine and read."

The witness identified a pamphlet entitled "Coming to Oregon," and testified that she had seen it in the office of the Oregon Inland Development Company during the time she was employed there as a stenographer. It was one of the pieces of literature sent out through the United States mails by the Oregon Inland Development Company to all contract holders and to all prospects. It was purchased in large quantities, of from ten to twenty thousand.

Whereupon the Government offered the pamphlet in evidence. The defendant objected to it upon the ground that it was incompetent in that there is no evidence that defendant is responsible for its preparation and its issuance, and on the ground that it is irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. The pamphlet was received in evidence and marked as Complainant's Exhibit Thirty.

The witness identified a pamphlet entitled "Grand Ronde District in Oregon," and containing upon the out-

side cover a photograph of three apples, and testified that this was a booklet describing the Grand Ronde district, prepared by J. T. Conway and was bought in very large quantities; that it was mailed through the United States mails to the contract holders and to prospects, and sent to the agents by express; that it was considered one of the best pieces of literature. It was purchased by the officers of the Oregon Inland Development Company in quantities not less than ten thousand and probably there were twenty thousand copies. It was sent out through the mails during the latter part of 1910 and first part of 1911. All of the officers of the Oregon Inland Development Company knew of the mailing and sending out of this piece of literature. They all thought it was very fine and they talked about it and Mr. Riddell knew about it because he saw the witness writing some of it on the typewriter.

Whereupon the Government offered the booklet in evidence. The defendant objected to its introduction upon the ground that it was irrelevant and immaterial and there was no evidence showing defendant to be responsible for either its preparation or its mailing. The objection was overruled; an exception was asked and allowed. The document was received in evidence and marked as Complainant's Exhibit Thirty-one.

The witness identified a large poster entitled "Grand Ronde District in Oregon" and containing a cut showing thirteen photographic views and a map marked in red. She testified that this was one of the pieces of lit-

erature of the Oregon Inland Development Company prepared and mailed in the spring of 1911. There were ten thousand copies of this purchased and they were sent to every agent, contract holder and prospect through the agency of the United States mails. This literature was kept in a pile right inside the door, on a table, and on the counter, and there was one of the posters on the wall. "Mr. Riddell knew we were getting out the big poster and he saw it on the wall and he saw it after it was published and he was very enthusiastic about it. He said this poster ought to get the business if anything would."

Whereupon the Government offered the poster in evidence, to which the defendant objected on the ground that it was irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. The poster was received in evidence and marked as Complainant's Exhibit Thirty-two.

The witness identified check No. 429 of date March 8, 1911, in favor of the Portland Printing House Company in the sum of \$63.75, drawn upon the Merchants National Bank of Portland, Oregon, and an attached receipted bill for 3000 circulars; a receipted bill of the Portland Printing House Company of date February 16, 1911, in the sum of \$29.25, for 20,000 circulars; a cancelled check No. 362 of date February 3, 1911, drawn upon the Merchants National Bank of Portland, Oregon, in favor of the Portland Printing House Company, in the sum of \$199.00; a cancelled check No. 485, of date March 31, 1911, drawn upon the Merchants National Bank in favor of the Portland Printing House Company

in the sum of \$124.00, together with the receipted bills of the Portland Printing House Company attached thereto, and testified that the checks were all in the hand writing of the witness and that they had been signed by H. H. Riddell, as Secretary and F. Richet, as Treasurer of the Oregon Inland Development Company, and that these checks were written and issued in payment of the booklets and advertising literature of the Oregon Inland Development Company.

The cancelled checks and receipted bills were offered and received in evidence and marked as Complainant's Exhibit Thirty-three.

At the time of the introduction of these exhibits, counsel for defendant stated:

"I don't think we have any objection to this except the general exception we already have."

The witness further testified that defendant H. H. Riddell, as an attorney, had examined all of the abstracts of the lands of the Oregon Inland Development Company during the time the witness was employed as stenographer. The witness further identified a book containing the record of all of the contracts that had been sold and testified that the books correctly showed the number of the contracts, to whom they were sold, the amounts due on the contracts and the amounts and dates of the several payments. (The book was also subsequently identified and testified to as being accurate by the witness Miss Fannie Dean, and witness Miss Bollman, who succeeded the witness as bookkeeper for the

company. All entries in the book were made by the three witnesses.)

The Government offered the book in evidence and it was received and marked as Complainant's Exhibit Thirty-four.

The witness then identified a book of accounts as a cash book of the Oregon Inland Development Company, and testified that the entries therein were correct.

The Government offered the book in evidence and it was received and marked as Complainant's Exhibit Thirty-five.

The witness then identified a book of accounts as the ledger of the company and testified to the accuracy of the entries therein, and that the same had been correctly kept.

The Government offered the book in evidence and it was received and marked as Complainant's Exhibit Thirty-six.

The witness testified that it was the business of the company to keep a number of index cards, which were kept by the witness. She testified that these were records of the several contracts. They showed the date when the next payment of the contract holder would become due. Ten days before the payment was to become due, each contract holder would be notified by the witness of this fact and be asked for a remittance.

The witness testified that on April 1, 1911, the company moved its offices from the Chamber of Commerce building to offices in the Yeon building; they then maintained their offices upon the eleventh floor of the Yeon building, the rooms being so arranged that there was a general waiting room or reception room, and that to the right of this there was another office occupied by the defendant H. H. Riddell; to the left of the reception room there was an office occupied by Conway and Richet. The reception room of the Oregon Inland Development Company was used as a common reception room by the Oregon Inland Development Company and Riddell. The clients of Mr. Riddell and people who called to see him would come into the reception room of the company and then go directly into his office. During the period of time that the company was in the Yeon building, maintaining the common reception room, the literature that was being sent out consisted almost exclusively of the booklets showing the picture of the three red apples (Complainant's Exhibit Thirty-one) and the big red poster (Complainant's Exhibit Thirty-two). The advertising literature was kept partly in the reception room and partly in a little closet. Part of it was kept in Mr. Conway's room.

The witness identified the form application of contract holder Mary C. Jackson, and testified that this was a form used by the company up until the time the change was made on the lands in Union county. At the time the witness came to work for the company, the price of the contract was \$240.00.

The Government offered the form in evidence. The defendant objected on the ground that it was irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. It was received in evidence and marked as Complainant's Exhibit Thirty-eight.

The witness identified a copy of a form duplicate application of contract holder Mary C. Jackson, which was printed on a blue slip of paper, and testified that this was a form of contract used by the company after the land had been transferred to the Grand Ronde Valley district and the price had been raised to \$300.00. She testified that the first form or Complainant's Exhibit Thirty-eight, related entirely to the Veasen lands, while the second or blue slip related entirely to the lands in the Grand Ronde district.

The Government offered the form application in evidence. The defendant objected on the ground that it was irrelevant and immaterial. The objection was overruled and an exception was asked and allowed. The form was received in evidence and marked as Complainant's Exhibit Thirty-nine.

The witness identified a contract of date March 4, 1911, signed by the Oregon Inland Development Company, by F. Richet, President, and H. H. Riddell, Secretary, and signed by W. H. Patton. She identified the signatures as true and genuine, and testified concerning the execution of the contract.

The Government offered the contract in evidence. The defendant objected on the ground that

it was irrelevant and immaterial, but there was no objection on the ground that it had not been sufficiently proved. The objection was overruled. The defendant asked for an exception and it was allowed. The contract was received in evidence and marked as Complainant's Exhibit Forty.

Mrs. Fannie Dean, a stenographer and bookkeeper, and who is the same person referred to in the testimony as Miss Fannie Yost, testified on behalf of the Government that she was a stenographer and bookkeeper for the Oregon Inland Development Company during May, 1911, and until approximately May, 1912, and that she had worked two or three weeks during the month of February, 1911, as an assistant. Her principal duties were to send out the literature for the company. She identified Complainant's Exhibit Thirty-one as being a piece of literature with the three red apples pictured upon the front cover. She also identified the piece of literature entitled "Fruitdale," and also identified Complainant's Exhibit Thirty-eight as a part of the advertising literature of the company which she had sent out in large quantities through the mails. This literature and the letters of the company were mailed by her in the city of Portland, Oregon. The officers of the Oregon Inland Development Company, during the time she was employed by it, were Frank Richet, President, J. T. Conway, General Manager, and H. H. Riddell, Secretary. The offices of the company during February, 1911, were in the Chamber of Commerce building, and the witness saw Mr. Riddell there two or three times while the offices were there. The witness came to work for the com-

pany permanently on May 1, 1911, and continued her employment until about May 17, 1912. At the time the witness went to work for the company on May 1, 1911, the offices of the company were then in the Yeon building. The witness described the arrangement of the offices substantially in the same manner as they had been described by the witness O'Gara. The advertising literature of the Oregon Inland Development Company was sent out by her in large quantities through the agency of the United States mails. During the time the witness was employed by the company Mr. Riddell would come in through the reception room where the literature was and pass on into his own office.

“Q. What have you to say as to whether or not he knew that this literature was being sent out by you as an employe of the Oregon Inland Development Company?

A. Well, I couldn't say only that Mr. Riddell could see the literature there, it was lying there and he could see it; that is all I could say whether he knew or not.

The form letters would be gotten up and prepared by Mr. Conway; he would write them out in long hand—write them generally, then they would be submitted to Mr. Richet for his approval, and Mr. Riddell, and I would write them on the typewriter. Then that similar letter would go to all the contract holders through the agency of the United States mails. During all of the time I was employed as stenographer and bookkeeper of the company Mr. Riddell examined all of the abstracts.”

The witness examined clearance receipt 554 in the sum of \$300.00 of date May 29, 1911, and clearance receipt 557 for \$300.00, of date June 9, 1911, and testified that the names of the contract holders, the dates and the addresses were all in the hand writing of the witness; that the clearance receipts had been signed by Mr. Richet, as president, and Mr. H. H. Riddell as secretary.

“Q. Now, taking up the first one, No. 557, it is in favor of a Mr. E. H. Bryant, of Gallup, New Mexico, and the one 554 is in favor of J. K. Hartline, Albuquerque, New Mexico, through what agency would that be transmitted to these gentlemen residing in those places?

Mr. McCamant: I object to that as not binding upon the defendant and irrelevant and immaterial for the reason that the matter to which the witness' attention has been called could not by any possibility be effectual to carry out the scheme alleged in the indictment because no further money was to be paid, according to the allegations of the indictment and also because there is no proof whatever that the defendant caused these papers to be mailed. He must either mail them or cause them to be mailed, as I read the statute or read the authorities, and in the absence of proof of that sort, the testimony designed to be drawn out in response to this interrogatory, would be immaterial.

Mr. Reames: I desire at this time to have them marked for the purpose of identification. I will say in answer that at the time I offer in evidence I will at the same time submit authority to the court to the effect

that if there be a scheme and artifice to defraud, it contemplated the use of the mail and a general manager was placed in charge of an institution, and if a piece of literature was contemplated by that scheme to be mailed and it was mailed, in pursuance of that scheme, every party to that scheme or artifice to defraud, is one of the parties who caused the piece of literature to be mailed. I will say to your Honor that I will have authorities on that which I will present at the time I offer it.

COURT: The witness can testify. Of course, this was passed upon by the court of appeals recently in the case against Belden in which they held that where there were two or more parties engaged in a scheme of this kind, the act of one was binding on the other, whether he knew of it or not, if in pursuance of the common scheme, and it has been repeatedly held that it was not necessary that the letter or pamphlet which went through the mails was effective to accomplish the purpose the party had in view, or whether it was intended to induce them to invest in the fraudulent enterprise or not; if it was in furtherance of the scheme that is all the law requires, although it may have been a perfectly innocent transaction within itself.

Exception saved."

"These clearance receipts were first prepared by me and then taken to Mr. Richet and Mr. Riddell for their respective signatures." After Mr. Richet had signed them, and after Mr. Riddell had signed them, they would then be mailed by the witness.

To all of the testimony relative to the execution and the alleged mailing of the clearance receipts, the defendant objected upon the ground that the mailing of these had not been connected up with the defendant, and upon the further ground that they were incompetent, irrelevant and immaterial. The objection was overruled and an exception was asked and allowed.

The clearance receipts were marked as Complainant's Exhibit Forty-one, for identification, and Complainant's Exhibit Forty-two, for identification.

During the time that the witness was in the employ of the company, payments were made to the company through the agency of the mails each day by contract holders, and the literature of the company was sent out as late as September, 1911. The business of the company was transacted entirely by Mr. Conway, and by the witness under his direction. She never took any orders from Mr. Riddell and he never directed the witness to make an entry in the books. He knew nothing about the records or books of the company and did not have the combination to the safe or a key to the office of the company; that all the records and books of the company were kept in the safe; that when Mr. Conway was out of town the witness was in charge of the office and the business; that if anything difficult arose, the witness kept it until Mr. Conway returned; that Mr. Riddell did not have access to the books or the papers of the company; that Mr. Riddell signed the clearance receipts as secre-

tary of the company when they were presented to him by the witness for his signature, and sometimes he signed them in blank; that the correspondence of the company was written by the witness at the dictation of Mr. Conway, and that Mr. Riddell had nothing to do with it; that Mr. Riddell examined the abstracts for the company and signed the checks when asked to do so by the witness; that during the summer of 1911 Mr. Riddell was away a great deal of the time attending to his own business; that his office was separate from the office of the company; that he seldom came into the office of the company; that he passed on abstracts and papers when requested to do so by Mr. Conway; that he did not take any part in the management or operation of the company's business; that form letters were sometimes submitted to him for an opinion as to form before they were sent out; that the letter to W. C. Hayward, which is set out in Count 3 of the indictment, may have been shown to him before it was sent out. As to this the witness did not remember. That the witness was not certain whether or not the letter was mailed to Hayward. That the clearance receipt set out in Count 5, and the clearance receipt set out in Count 4 of the indictment, were signed by Mr. Riddell, as secretary of the company and given to Mr. Conway. That Mr. Richet had been complaining because Mr. Riddell was not in his office when he wanted an opinion or some paper drawn; that Mr. Riddell worked for the company on a salary and was not consulted about the office business; that the witness received and sent out the mail, took care of the money coming in and entered it into the books, placed the funds in

the bank and prepared the checks at the direction of Mr. Conway. That the entire management of the business of the company was directed by Mr. Conway; that the witness thought the lands that the company were selling were good; that she was told that they were; that Mr. Riddell received the same information that she did; that the witness had no means of knowing anything about the lands except what was told her in the office; that Mr. Conway, Mr. Richet and Mr. Hibberd, the agents, and everybody who had knowledge of the lands, were loud in their praise; that the form letters were often written on a stencil sheet and mimeographed; that the witness knows of one form letter that was not submitted to Mr. Riddell, this being one that was dictated by Mr. Bowerman; that form letters were frequently submitted to Riddell for an opinion before they were sent out.

Whereupon E. W. Donnelly, Henry Ireland, Walter J. Jones, R. S. Shelley, J. E. Gribble, C. S. Congleton, J. W. Schmitz, W. A. Donnelly, G. C. Blake and G. C. Stevenson, were sworn and testified as witnesses for the Government. They were each forest rangers in the employ of the Government and had recently made a careful examination of all of the lands described in the photographic copies of the deeds set out in the two issues of "Success." They had cruised these lands and made a careful examination of the same for the purpose of ascertaining their true character, and in some instances had taken pictures thereof.

Whereupon each of said witnesses was by the Government asked to describe the kind, the quality and the

character of the said lands described in said photographic copies of said deeds.

The defendant objected to each question on the ground that the said lands did not tend in any way to connect the defendant with any charge set forth in the indictment; that said lands were not being sold or advertised for more than three years before the indictment was found, and that none of the lands or documents referred to and set out in the indictment relate to the above described lands, or any parcel thereof. The objection was overruled and to the ruling the defendant in each instance and in each case excepted and the exception was allowed.

Whereupon, over said objection and said exception, the witnesses thereupon testified in substance that the said lands described in said photographic copies of said deeds, and all thereof, were in the high mountains, many of them were on the tops of mountain peaks they were arid, rocky, dry, cut up with gulches and deep ravines, containing but a small amount of merchantable timber, of poor quality; that on some of the tracts snow lie as late as August; that the lands were nearly all within the boundaries of the National Forests, and were all, and every part thereof, absolutely worthless and unfit for any agricultural or horticultural uses whatsoever.

Over the same objection and exception the Government offered in evidence, and there was received, Complainant's Exhibit Twenty-one, Complain-

ant's Exhibit Twenty-two and Complainant's Exhibit Twenty-three,

showing the character of some of the Veasen lands, one of the said witnesses testifying that he had taken the said pictures upon said lands and that they truly portrayed conditions thereon.

With reference to Complainant's Exhibit Thirty-two, being the large poster entitled "Grand Ronde District, Oregon," the Government then offered testimony tending to prove that the picture entitled "Native Hay Scene on Our Land Near Promise," the picture entitled "Scene on Our Land in Baker County Note the deep soil on creek bank," the picture entitled "Trout Stream Crossing Corner of One of Our 20-Acre Tracts Southeast of Elgin," the picture entitled "Scene on Our Land West of La Grande," the picture entitled "Corn Field near Our Land in Wallowa County," the picture entitled "Part of Our Land near North Powder," the picture entitled "Part of Our Land in Baker County showing Creek," the picture entitled "Scene on One of our 40-Acre Tracts East of Imbler," the picture entitled "Part of Our Land near La Grande Note the gentle slope," the picture entitled "Peach Tree near Our Land West of Elgin," and each, every and all of said pictures depicted and portrayed scenes that were not upon any lands that had ever been owned by the Oregon Inland Development Company. In regard to several of said pictures, it was shown by the testimony of the parties whose pictures were shown on said photographs, that the lands were owned by parties other than the Oregon Inland

Development Company and had never been owned by said corporation.

The County Recorder of Baker County, and the County Recorder of Wallowa County, each being sworn, testified that they had each made a careful examination of all of the records of Baker and Wallowa counties relative to the ownership of lands in said respective counties by the Oregon Inland Development Company, and that the said corporation, as shown by said respective records, was not and never had been the owner of any lands or of any contract to purchase any lands situated within either of said counties.

The County Recorder of Union County, Oregon, testified that as shown by the records of said county, the Oregon Inland Development Company was the owner of the following described tract of land in said county:

The West half of the Southwest quarter, the Northeast quarter of the Southwest quarter and the North half of the Southeast quarter of Section Seventeen, Township One, South of Range Forty, East of the Willamette Meridian; the East half of the West half of Section Twenty-one, the Southwest quarter of the Southwest quarter of Section Sixteen, all in Township One, South, Range Forty East of the Willamette Meridian; the Southwest quarter of the Southeast quarter and the South half of the Southwest quarter of Section One, Lot Four and the Southwest quarter of the Northwest quarter of Section Three; Lots One, Two, Three and Four of the South half of the Northeast quarter and the South half of the Northwest quarter of Section Four;

the West half of the Northeast quarter and the East half of the Northwest quarter and the Northwest quarter of the Northwest quarter of Section Twelve, all in Township Four South, Range Thirty-five East; the North half of the Northeast quarter of Section Eight; the South half of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section Nine; all in Township One North, Range Thirty-eight East; the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section Five; the Northeast quarter of the Southeast quarter and the Southeast quarter of the Northeast quarter of Section Six; all in Township Two North, Range Thirty-nine East; the Southwest quarter of the Northwest quarter; the Northwest quarter of the Southwest quarter of Section Twenty-six and the North half of the Southeast quarter of Section Twenty-seven and the North half of the Northeast quarter of Section Twenty-eight, all in Township Three South, Range Thirty-five East of the Willamette Meridian; the North half of the Northeast quarter of Section Twenty-five, in Township One, South, Range Thirty-nine East of the Willamette Meridian; Lots One and Two in Section Thirty, Township One South, Range Forty East of the Willamette Meridian; the South half of the Southwest quarter of Section Twenty-seven and the North half of the Northwest quarter of Section Thirty-four, Township Three North, Range Thirty-nine, East of the Willamette Meridian, and the Northwest quarter of the Northeast quarter of Section Eighteen, Township Two North, Range Thirty-nine, East of the Willamette

Meridian; Lot One, the same being the Northwest quarter of the Northwest quarter of Section Seven, Township Two North, Range Thirty-nine, East of the Willamette Meridian; the Southeast quarter of the Southeast quarter of Section Twenty-four; the North half of the Northwest quarter of Section Twenty-five; the Northeast quarter of the Northeast quarter of Section Twenty-six, all in Township One South, Range Thirty-nine, East of the Willamette Meridian; the South half of the Northeast quarter of Section Thirty-one, Township One South, Range Forty, East of the Willamette Meridian, all of said lands being in Union County, Oregon.

The witness further testified that the Oregon Inland Development Company was not the owner, and never had been, as shown by the records of Union County, of any other lands, or a contract to purchase the same, located in said county.

S. I. Renshaw, a witness called on behalf of the Government, testified that he formerly lived in Oklahoma; that he was one of the agents of the Oregon Inland Development Company, engaged in the sale of its auction contracts for it. He identified Complainant's Exhibit Twenty-six as his selling agent's contract. The witness began working for the company in April, 1910, and worked for it in the sale of the auction contracts until July, 1911. The witness identified a letter of date November 22, 1910, signed by the Oregon Inland Development Company as one received by him through the agency of the United States mails at the time when he was in Sapulpa, Oklahoma.

The Government offered the letter in evidence. The defendant objected upon the ground that it was incompetent, irrelevant and immaterial; that it appeared upon its face to be a stamped signature and not a signature. The objection was overruled and an exception was asked and allowed. The document was received in evidence and marked as Complainant's Exhibit Forty-five.

The witness testified that through the agency of the mail and express, and from the Oregon Inland Development Company, he had, while he was an agent, received a great amount of advertising literature; that he received a great number of copies of Complainant's Exhibit Thirteen, Complainant's Exhibit Fifteen, Complainant's Exhibit Twenty-eight, Complainant's Exhibit Thirty-nine, Complainant's Exhibit Thirty-one, Complainant's Exhibit Twenty-nine, Complainant's Exhibit Eighteen, Complainant's Exhibit Seventeen, a great many copies of the big red poster with the large number of pictures upon it, entitled "Grand Ronde District. Oregon," and that he had for the company used all of said literature in advertising the lands of the company and procuring auction contracts for the purpose of making sales. The witness identified Complainant's Exhibit Thirty-eight and Complainant's Exhibit Thirty-nine as two form applications similar in form to those used by him; that he took approximately fifty applications for the company during the period of time he was working for it; that he himself was a contract holder, had paid up the full purchaser price of his contract and had received no benefit therefor, had

never had his money returned to him, or received any land from the company.

Introduction of all of this testimony the defendant objected to on the ground that it was incompetent, irrelevant and immaterial; that the literature describing the Veasen lands described lands that had not been offered for sale within three years prior to the finding of the indictment; that there was no proof connecting the defendant Riddell with the mailing of any of said literature; the objections were all overruled and to the ruling of the court in each instance the defendant asked and was allowed an exception.

The witnesses Mrs. Frances Jackson, E. L. Swanson, Robert W. Simpson, George W. Page, Theodore Rehberg, Mrs. E. B. Watts, G. F. Deilke, Alfred F. Pitts, L. W. Howell, Harry Watts, Mrs. Patsy Doran, W. F. Burkhart, E. Baker, being called as witnesses on behalf of the Government, each testified in substance that they were auction contract holders of the Oregon Inland Development Company; that they had received through the agency of the United States mails, in letters and packages postmarked from Portland, Oregon, copies of all of the literature of the Oregon Inland Development Company heretofore shown in the bill of exceptions as having been introduced in evidence; that on account of the representations contained therein, they were induced to and did pay and continue to pay to the Oregon Inland Development Company the purchase price of their respective contracts; that said con-

tracts had been for a long time paid up in full, and that they had never received anything of value, or any land whatsoever on account of said contracts; that at the time they made their first payment, they received through the mails from the Oregon Inland Development Company a letter identically similar in form to Complainant's Exhibit Sixteen; that they, and each of them, had purchased said auction contracts without making any personal inspection of said lands; each of said witnesses produced, and there were offered in evidence, the originals of contracts similar in form to Complainant's Exhibit Thirty-eight and Complainant's Exhibit Thirty-nine, and each testified that at the time they executed the contract similar in form to Complainant's Exhibit Thirty-nine, they were not required to pay any additional amount of money on account of the change of the lands from the Veasen lands to the Union County lands, or on account of the increase in price.

While said witnesses were upon the stand, contract No. 521 was introduced in evidence, the defendant admitting the correctness of his signature thereto. It was marked as Complainant's Exhibit Forty-six; and clearance receipt of date February 27, 1911, being clearance receipt No. 521, admitted by the defendant Riddell to have been signed by him, was introduced in evidence and marked as Complainant's Exhibit Forty-seven; and letter, inclosure and envelope proven to have been received through the United States mails and bearing the stamped signature of Conway, Richet and Riddell, was offered in evidence and received and marked as Complainant's Exhibit Forty-eight; a yellow application

slip of date of April 12, 1910, signed by Robert W. Simpson, and identified by him as his contract with the Oregon Inland Development Company, was offered and received in evidence as Complainant's Exhibit Forty-nine; a clearance receipt numbered 525, which the defendant admitted was signed by him, was offered and received in evidence and marked as Complainant's Exhibit Fifty; an application and a contract of date July 21, 1910, executed by Theodore Rehberg, was received and marked as Complainant's Exhibit Fifty-two; contract No. 522, admitted by the defendant Riddell to have been signed by him and the signatures of F. Richet having been admitted, was received and marked as Complainant's Exhibit Fifty-three; a clearance receipt numbered 522, admitted by the defendant Riddell as having been signed by him and Richet, was offered in evidence, received and marked as Complainant's Exhibit Fifty-four; a letter of date May 21, 1910, proven to have been received by the addressee through the agency of the United States mails, bearing a facsimile signature of the defendant Riddell, was offered in evidence and marked as Complainant's Exhibit Fifty-five; an original application and contract of date April 5, 1910, in favor of A. F. Pitts was received and marked as Complainant's Exhibit Fifty-six; a clearance receipt of date September 18, 1911, bearing the admitted signature of Mr. Richet and the defendant Riddell, was received and marked as Complainant's Exhibit Fifty-seven; an application of date June 13, 1910, printed on yellow paper, together with another application of date September 22, 1911, printed on blue paper, both signed

by L. W. Howell and identified as his contract with the Oregon Inland Development Company, was received and marked as Complainant's Exhibit Fifty-eight; a form of acknowledgment receipt, of date June 15, 1910, addressed to L. W. Howell, at 520 Ninth Street, Hoquiam, Washington, and bearing a fac-simile signature of the defendant Riddell, was received and marked as Complainant's Exhibit Fifty-nine; an application upon a pink slip signed by Harry Watts, an application upon a blue slip signed by Harry Watts, and contract No. 517, of date December 31, 1909, and admitted to have been signed and executed by Frank Richet and the defendant H. H. Riddell, was received in evidence and marked as Complainant's Exhibit Sixty; clearance receipt No. 517, admittedly signed by Richet, as president, and Riddell, as secretary, was received and marked as Complainant's Exhibit Sixty-one; an application upon a yellow form, executed by Mrs. Patsy Doran, was received and marked as Complainant's Exhibit Sixty-two; clearance receipt No. 538, admitted to have been signed by Frank Richet and H. H. Riddell in favor of Mrs. Patsy Doran was received and marked as Complainant's Exhibit Sixty-three; the second application of Mrs. Patsy Doran was received and marked as Complainant's Exhibit Sixty-four; clearance receipt No. 528, which was admitted to have been signed by Richet and Riddell in favor of W. F. Burkhart was received and marked as Complainant's Exhibit Sixty-five; a pink application and a blue application executed by the witness E. Baker was received and marked as Complainant's Exhibit Sixty-six. The proof of the Gov-

ernment from these witnesses was further to the effect that these documents had been received from the Oregon Inland Development Company at their respective addresses through the agency of the mails of the United States and constituted and was a part of the respective contract and transactions with the Oregon Inland Development Company.

To the introduction of each, every and all of said exhibits the defendant duly objected upon the ground that they were irrelevant, and immaterial, and that they did not connect the defendant with any crime charged in the indictment. Each objection was overruled and the defendant asked and was allowed in each instance an exception.

To all of this testimony the defendant objected upon the ground that there was nothing shown therein to connect the defendant therewith; that it was incompetent, irrelevant and immaterial; that the testimony showed that that portion of the literature describing the Veasen lands, described lands which had not been sold within the three year period immediately preceding the finding of the indictment; in each instance the objection was overruled and the defendant asked and was allowed an exception.

Some of the witnesses testified that they had called at the office of the Oregon Inland Development Company and had seen the big red poster upon the wall.

R. H. Gilliland, a special agent of the General Land Office, testified that he had prepared a map showing

the location of Townships One, Two, Three and Four, both North and South, Thirty-five East, Thirty-six, Thirty-seven, Thirty-eight, Thirty-nine and Forty East, both North and South, which was a sectional map showing thereon correctly the location of the cities of Elgin and La Grande in Union County, Oregon; that there was also marked thereon in red ink all of the lands hereinbefore in this bill of exceptions described as being the lands owned by the Oregon Inland Development Company in Union County, Oregon.

The map was offered in evidence, was received without objection and marked as Complainant's Exhibit Fifty-one.

Whereupon, by the testimony of witnesses who had examined the lands situated in Union County, and in this bill of exceptions described as the lands owned therein by the Oregon Inland Development Company, the Government proved that the said lands were mountainous, rocky, cut up with draws and not fit for agriculture or horticulture.

One of these witnesses was R. W. Allen, an agricultural expert from the State Experiment Station, who made a personal examination of all of said lands in Union County at the instance of the Government, in order to determine the character and nature of the soil. He took a great many pictures upon said tracts of land, which were exhibited to the jury and introduced in evidence. In testing the character and nature of the soil, he did this from personal observation and from his experience as an expert in agricultural matters.

He used a one inch auger to bore into the ground to make his tests.

The Government offered and there were received in evidence, without objection, Complainant's Exhibits Sixty-seven to One hundred, inclusive.

The exhibits consist of photographs taken by the witness Allen upon the lands of the Oregon Inland Development Company located in Union County, Oregon, he having testified that these photographs fairly and truthfully depict and show the true character of said lands.

Whereupon by the testimony of witnesses who were familiar with the property in question, and who were residents of Klamath Falls, in Oregon, the Government proved that the lands of the Oregon Inland Development Company in Klamath County, which had been in the year 1912 by said company platted as "Orindale," were all distant two miles from the city limits of Klamath Falls, Oregon, and were absolutely worthless for town lot purposes; that there were two ranges of hills between the city and the said addition and the lands had a value of approximately from \$15.00 to \$18.00 per acre for grazing purposes, but were without value for town lots.

Whereupon a plat of "Orindale" was introduced and received in evidence and marked Exhibit One hundred twenty-five.

Whereupon the following papers were introduced and received in evidence:

A certified copy of a deed from F. H. McCornack and wife to Eugenie V. Richet to the land included in Orindale, marked Exhibit One hundred two;

A deed from Eugenie V. Richet and husband to the Oregon Inland Development Company for the Orindale tract, received and marked Exhibit One hundred one;

A certified copy of a mortgage from the Oregon Inland Development Company to Eugenie V. Richet, received and marked Exhibit One hundred five;

A certified copy of a satisfaction of mortgage for a portion of Orindale, marked Exhibit One hundred six;

A certified copy of a satisfaction of mortgage from F. H. McCornack to the Oregon Inland Development Company releasing a portion of the Orindale tract, received and marked Exhibit One hundred seven;

A certified copy of a satisfaction of mortgage to the Orindale tract, received and marked Exhibit One hundred eight.

Miss E. C. Bollman, being sworn, testified that she was stenographer and bookkeeper for the Oregon Inland Development Company from May, 1912, to February, 1913. That she succeeded Mrs. Dean (nee Fannie Yost). She identified the books of the company

that were kept by her (Exhibits Thirty-four, Thirty-five and Thirty-six). Her last work for the company was done in the latter part of February, 1913. Payments were made by contract holders during the time she worked for the company. Mr. Riddell knew nothing of the contents of the books. He did not direct any of the business of the company. He did not have the combination to the safe, or a key to the office. The books, records and money were kept in the safe. Conway transacted all the business. Riddell gave up his office and moved away about November 1, 1912. He was not about the office of the company afterwards.

Hiram S. House, expert accountant of the Department of Justice, testified that following his examination of the books and records of the company, he had prepared a list showing a list of all the contracts upon which the entire payments had been made to the Oregon Inland Development Company; this list was offered in evidence and received and marked as Complainant's Exhibit One hundred fifteen. The witness further testified that he had prepared a financial statement showing the receipt and distribution of the money received by said company. This was offered and received in evidence and marked as Complainant's Exhibit One hundred sixteen. The witness further testified that he had prepared a list showing from the books the names of the contract holders who had been transferred by the Oregon Inland Development Company to straight acreage and the amount of money due upon the several contracts at the time of the transfer. This was by the Government offered and received in evi-

dence and marked as Complainant's Exhibit One hundred seventeen.

There were offered and received in evidence, without objection, a duly certified copy of a warranty deed executed by Levi Kidwell in favor of the Oregon Inland Development Company; a duly certified copy of a deed executed by F. S. Stanley et al., of date July 12, 1912, in favor of the Oregon Inland Development Company; a duly certified copy of a deed executed by C. R. Hibberd and wife, dated March 1, 1912, in favor of the Oregon Inland Development Company; a duly certified copy of a deed executed by C. R. Hibberd and wife, of date February 14, 1912, in favor of the Oregon Inland Development Company; a duly certified copy of a deed executed by C. R. Hibberd and wife, of date September 2, 1911, in favor of the Oregon Inland Development Company; a duly certified copy of a deed executed December 14, 1911, by C. R. Hibberd and wife, in favor of the Oregon Inland Development Company; a duly certified copy of a deed executed by W. T. Wade and wife in favor of the Oregon Inland Development Company, dated February 4, 1911; a duly certified copy of a deed executed January 23, 1911, by the Hackett Lumber Company in favor of the Oregon Inland Development Company. These were all received without objection and marked as Complainant's Exhibit Forty-four, as containing the descriptions of the lands owned by the Oregon Inland Development Company in Union County, Oregon.

J. K. Hartline, a witness called on behalf of the Government testified that he resided in Albuquerque,

New Mexico, and had lived there since the year 1906 and was a machinist by occupation. He identified a contract of date April 12, 1910, as his original contract with the Oregon Inland Development Company. The defendant admitted that it bore the stamped signature of the defendant Riddell, but did not admit that the defendant signed it. The document was received in evidence and marked as Complainant's Exhibit One hundred nineteen and a half. The witness testified that on account of that contract he had paid to the Oregon Inland Development Company \$150.00 in cash. The witness identified clearance receipt No. 554, being Complainant's Exhibit Forty-one, for identification and testified that after he had paid up in full he received this receipt at Albuquerque, New Mexico, in June or July, 1911, and that he received it through the agency of the United States mails; that it came to him in an envelope postmarked at Portland, Oregon, and from the Oregon Inland Development Company at Portland, Oregon.

"Q. And this is the receipt you received at that time, at that place, and from the company and place, and in the manner concerning which you have testified?

Mr. McCamant: Same objection, incompetent, irrelevant and immaterial.

Mr. Reames: This receipt which the witness holds in his hand, being Complainant's Identification No. Forty-one, has been identified by the witness Fannie Yost, as bearing the signature of F. Richet as President and H. H. Riddell as Secretary, and she has testi-

fied as to the custom of the office in mailing these clearance receipts to the stockholders, and the Government now offers in evidence clearance receipt No. 554, and states to the court at this time that this forms the basis of Count 5 in the indictment.

Mr. McCamant: Objected to as incompetent, irrelevant and immaterial on the ground that the mailing of it has not been connected up with the defendant. The objection was overruled, an exception was allowed and the Exhibit was marked as Complainant's Exhibit Forty-one.

COURT: In making this ruling, I am not holding that the evidence does connect the defendant up with the mailing of it, but simply holding there is evidence tending to show his responsibility for it; that it all."

The witness further testified that he had never received anything of value for the money he had paid and had never received any property or any lot in Klamath Falls, Oregon. Upon cross examination the witness testified that the company did write a letter once about transferring him to straight acreage, but that he did not elect to take up the proposition. Whereupon the witness testified no further.

E. H. Bryant testified on behalf of the Government that he was a resident of Albuquerque, New Mexico, and had lived there for sixteen years, following the occupation of a locomotive engineer; that in June, 1911, the witness was living at Gallup, New Mexico; that he was one of the auction contract holders of the Oregon

Inland Development Company and purchased his contract in April, 1910; that by the terms of the contract he promised and agreed to pay the company \$150.00; that he paid \$20.00 down when he took the contract and \$10.00 a month thereafter until the entire amount was paid. The attention of the witness was directed to clearance receipt 557, of date June 9, 1911, and he was asked to examine the same and to state how it came into his possession.

“Mr. McCamant: I object to the latter part of that question as to how it came into his possession, on the ground outlined in the testimony of Mr. Hartline. I think it is incompetent, irrelevant and immaterial how it came there, unless proven that the defendant mailed it; and I am not sure that I recorded an exception to your Honor’s ruling on that first objection. May I have that as an exception to this ruling as well?

COURT: Yes.

The Witness: I received this through the United States mails at Gallup, New Mexico.”

The witness further testified that he received the clearance receipt in June, 1911; that it came to him through the United States mails, inclosed in an envelope and from the Oregon Inland Development Company, and that it came from Portland, Oregon.

“Mr. Reames: This was identified by the witness Mrs. Dean, the signature of the two officers of the corporation and the ordinary custom of the office in mail-

ing these clearance receipts. It forms the basis of Count No. 4 and I wish to offer it in evidence.

Mr. McCamant: Object as incompetent, irrelevant and immaterial, and for the reasons outlined this morning."

The objection was overruled and an exception was allowed and the document was received and marked as Complainant's Exhibit Forty-two.

The witness further testified that he had never been transferred to a straight acreage contract and had never received from the Oregon Inland Development Company any deed to any town lot in Klamath Falls, Oregon, and had never received anything of value for anything he had paid to the Oregon Inland Development Company.

Upon cross examination the witness testified he had paid no money to the Oregon Inland Development Company after the date of the receipt but that he had completed his payments prior to the date of the receipt and had done nothing further in the way of paying money or incurring any burden whatever after he had received the receipt. Whereupon the witness testified no further.

W. C. Hayward, a witness called on behalf of the Government, testified that he lived in the State of Iowa and his occupation was that of a passenger conductor; that he had lived in Iowa for 32 years and that he was one of the original contract holders of the Oregon Inland Development Company. He purchased two contracts, one for himself, on March 1, 1911, and one for

his son, and had agreed to pay \$240.00 for each contract. He had completed his payments and had paid the company \$480.00 on the two contracts and had received no money or land, or anything of value, for the money he had paid. The witness examined Complainant's Exhibit for identification No. 119, being a letter of date June 26, 1911, and testified that he received either a copy of the letter, or the original, at Manila, Iowa, through the agency of the United States mails. The witness could not say what he did with the original letter because he could not find it in his office when he left and they had had a fire in the building where his office was located and a number of his papers were lost. He further testified that he forwarded the letter to the United States Attorney at Portland, Oregon. The witness further testified that he had received the letter at Manila, Iowa, through the mails and that it came to him inclosed in an envelope from the Oregon Inland Development Company at Portland, Oregon.

“Mr. Reames: This is Government's Identification No. 119, and forms the basis of Indictment Count No. 3, and is the letter identified by the witness Mrs. Dean, concerning which I asked her this morning as to the preparation of form letters, and as to whom they were submitted before they were sent out, and the Government now offers in evidence the letter of date June 26, 1911.

Mr. McCamant: Objected to as incompetent, irrelevant and immaterial, not having been connected up with the defendant.”

The objection was overruled and an exception was asked and allowed and the letter was received and marked as Complainant's Exhibit One hundred nineteen.

The witness further testified that after he had received this letter from the Oregon Inland Development Company he made four payments upon his contracts; that he did not transfer to a particular piece of acreage, although, according to the terms of the letter, he had an opportunity to do so. Whereupon the witness testified no further.

A. H. Brobst, one of the contract holders of the Oregon Inland Development Company, testified for the Government and identified his application with the Oregon Inland Development Company. This was offered and received in evidence without objection, and marked as Complainant's Exhibit One hundred twenty-one.

Whereupon the Government offered in evidence and marked as Complainant's Exhibit Twenty, a large typographical map of the State of Oregon, showing the location of the several counties and townships within said state.

The forest rangers who had testified for the Government relative to the Veasen lands, had marked with crosses upon said map the location of the various Veasen lands concerning which they had testified.

Whereupon the Government announced that no proof would be offered of the mailing of the letters,

set out in Counts numbered one and two of the indictment.

Hiram S. House, an expert accountant for the Department of Justice, and admitted by the defendant to be qualified as an expert accountant, testified that he made a careful examination of and experted the books of the Oregon Inland Development Company at the instance of the Government; that the books of the corporation which had been introduced in evidence, showed the following facts:

That 260 auction contracts had been sold by the company between the date of its organization and October 17, 1910; that between the date of the organization and March 9, 1910, 28 auction contracts had been sold; that from March 23, 1910, to April 14, 1910, 39 auction contracts had been sold; that from April 14, 1910, to October 17, 1910, 193 auction contracts had been sold; that of the 260 auction contracts, one had been sold for \$100, 7 had been sold for \$125 each, 53 had been sold for \$150 each, 11 had been sold for \$180 each and 188 had been sold for \$240 each, making a total sales price of \$56,025. Upon these auction contracts there had been paid to the company between the date of its organization and October 17, 1910, \$10,789; the first payment had been made to the company on November 24, 1909. The auction contracts that had been sold by the company up to February 17, 1913, consisted of the following:

One at \$100; 7 at \$125; 53 at \$150; 11 at \$180; 349 at \$240; 143 at \$300, making a total number of auction

contracts sold, 564, and a total sales price of \$137,565; that the company had received in cash on its auction contracts \$62,189.70; that no contracts for straight acreage, being contracts wherein specific tracts of land were described, had been by the witness included in any of the above computations; there appeared to be a credit of \$182.50 and a credit of \$400 which had been charged to one Murray. Of the 564 auction contracts which had been sold, 184 of these had been by the auction contract holders paid out in full to the company, six of them had been transferred to straight acreage contracts, leaving 178 auction contracts outstanding and paid out in full. These 184 contract holders had paid to the company \$38,755; 94 of the auction contract holders had been transferred to straight acreage contracts in Union County and one appeared to have received a lot in Klamath Falls; 6 of these contract holders had fully paid up before they were transferred. Before the date of the transfer to the Union County property, the company had received from its auction contract holders \$10,750. The total cash receipts of the company are shown by the books as follows: from the sale of auction contracts, \$62,689.70; from straight acreage contracts, \$4,769.50; from the sale of Orindale lots, \$195; cash borrowed from bank, \$500; cash received from Wilsher, \$10; cash received from Byrne, \$403.21; cash received from Markillie, \$403.21, making the total receipts \$69,470.62.

The cash disbursements as shown by the books are as follows:

Paid to C. R. Hibberd, \$16,000; paid to Muck, \$390; paid to John Veasen, \$300; paid to Plass, \$2050; paid to Mrs. McMahon, \$160; paid to the State of Oregon, \$120; paid to Frank Richet, \$4040; paid to J. T. Conway, \$4910.15; paid to Frank Richet on commissions, \$568; cash refunded to contract holders, \$710; paid for expenses, \$31,340.32; paid for sundries, \$616.70; paid for surveying, \$1,818.85; paid to Murray, \$860; paid to Markillie, \$90; paid to Byrne, \$50; paid to H. H. Riddell, \$1,595.60; paid to Upton, \$500; paid to bills payable \$3,350, making a total disbursement of \$69,469.67, and leaving a balance of cash on hand on February 17, 1913, of 95 cents. From March 1, 1912 until February 17, 1913, the company had received in cash \$8,950, and on March 1, 1912, had cash on hand \$455.50. During this time the disbursements of the company were as follows: to Conway, \$1,825.15; to Richet, \$980; for bills payable, \$980; for surveying, \$1,100; for refunds, \$170; to Riddell, \$383.20; for expenses, \$2,111.20, or a total of \$9,599.53.

The witness further testified that the compensation to Mr. Riddell was paid mostly by way of office rent and telephone bills, and that he was paid but very little cash.

Whereupon the Government rested.

Whereupon the defendant called C. R. Hibberd, who being sworn, testified that he entered into a contract with the Oregon Inland Development Company in the fall of 1910 to furnish it lands in sufficient amount to satisfy the demands of its contract holders. The

lands were to be substantially such as were advertised by the corporation. The first contract was entered into about September 20, 1910, and the second contract on or about the 17th of October, 1910. Witness considered the lands that were purchased by him for the company suitable for raising fruit. The Wade and Hackett lands were fair fruit lands and in great part good soil. The other tracts were excellent fruit lands. The lands at Starkey prairie were not so suitable for fruit raising, but would raise fruit and were excellent for general agricultural purposes. Witness further testified that he owned property and had sufficient money to obtain property in amounts sufficient to enable the Oregon Inland Development Company to supply every contract holder with the required amount. At the time he entered into the contracts in September and October, 1910, he had under contract to purchase, lands in Baker, Wallowa counties similar to those described in the poster (Exhibit Thirty-two). These he contemplated turning into the corporation. Witness was often in the office of the company in Portland. Riddell was seldom or never in the office, and did not conduct any of the business of the corporation. Riddell understood that the lands were all first class lands, suitable for fruit raising. He was told so by myself, Conway, Richet and others and had every reason for believing that the lands were as good as was represented. Riddell was always careful in his work of passing on abstracts and found objections many times to titles that witness thought extremely technical. Witness had heard Conway and Richet say that Riddell had no interest in the corpora-

tion and that he did not take any part in the management of the business. His position as secretary was part of the duties for which he was paid, that he exerted no authority as a director, which was nominal to complete the board to the number required by law.

The witness identified a contract of date October 17, 1910, between the Oregon Inland Development Company and the witness, and proved its execution and the genuineness of the signatures attached thereto. It was received in evidence and marked as Defendant's Exhibit "E;" also a contract of date September 29, 1910, which was received in evidence and marked as Defendant's Exhibit "D;" also a contract of date May 6, 1911, which was received in evidence and marked as Defendant's Exhibit "F;" also a contract of date May 22, 1911, which was received in evidence and marked as Defendant's Exhibit "G;" also a contract of date May 22, 1911, which was received in evidence and marked Defendant's Exhibit "H;" also a contract of date July 19, 1911, which was received in evidence and marked Defendant's Exhibit "I"; also a contract of date July 19, 1911, which was received in evidence and marked Defendant's Exhibit "J"; also a contract of date July 19, 1911, which was received in evidence and marked as Defendant's Exhibit "K;" also a contract of date October 3, 1911, which was received in evidence and marked Defendant's Exhibit "L;" also a contract of date February 28, 1912, which was received in evidence and marked Defendant's Exhibit "M;" also a contract of date July 19, 1911, which was received in evidence and marked Defendant's Exhibit "N;" also a

contract of date December 18, 1911, which was received in evidence and marked Defendant's Exhibit "O."

Upon cross examination the witness testified in reference to the contract of date December 18, 1911 (Defendant's Exhibit "O") that this was a contract, by the terms of which the property described therein which had been theretofore under contract with the Oregon Inland Development Company, had been by said company released back to the witness upon the terms and conditions stated in the contract. The lands described in said contract were for the use and the benefit of, and the provisions of the contract were in favor of the 118 contract holders whose names are attached to the list. Of these 118 contract holders, but 29 were auction contract holders and the rest were contract holders who had contracted to purchase straight acreage. The witness was unable to state why it was that of 94 auction contract holders who transferred to straight acreage, that only six of them had been fully paid up subsequent to the execution of the contract of date December 18, 1911. The only lands of the Oregon Inland Development Company which were then available to take care of the auction contract holders, were the lands in Union County, consisting of approximately 2700 acres for which the deeds which are in evidence had been issued. These 2700 acres of land are all delineated and shown upon the big Government map as being marked in red (Complainant's Exhibit Fifty-one).

"The Oregon Inland Development Company never owned any lands, either in Wallowa county or in Baker

county, but I had originally intended to purchase lands in those counties for it in accordance with my contract with it of date October 17, 1910, being Defendant's Exhibit "E." Subsequent to the execution of the contract of date December 18, 1911, I came to Portland, Oregon, and took charge of the offices of the Oregon Inland Development Company for the purpose of receiving the money upon the collections and applying it as they owed me a large amount of money and still owe me approximately \$4000 on account of my transactions with them. I never did intend and, of course, would not deed either to the company or for the benefit of the company, any lands, or do any other thing than I bound myself to do in the said contract of date December 18, 1911, by which, of course, I was bound.

I saw the advertising literature of the Oregon Inland Development Company as it was being sent out and I thought that the representations made therein were pretty strong. I wrote a letter to the company of date October 25, 1910, and the letter you now hand me is the original of that letter."

Whereupon the Government offered the letter in evidence, to which the defendant objected on the ground that it was incompetent, irrelevant and immaterial. The objection was overruled and the defendant asked and was allowed an exception. The letter was received in evidence and marked as Complainant's Exhibit One hundred twenty-two.

"I was familiar with all of the lands owned by the Oregon Inland Development Company. The said com-

pany did not own 40,000 acres of Oregon farms; neither did they ever have a contract to purchase said amount of lands from me. I do not know where they had 2,712 farms, subdivided into 10 acres each, or 200 farms of 20 acres each, or 150 farms of 40 acres each, or 20 farms of 80 acres each, or one farm of 320 acres, or one farm of 640 acres. The pictures appearing in the literature entitled "Fruitdale," and the pictures shown upon the big red poster, are pictures of land which are not upon and are not adjoining any of the lands owned by the Oregon Inland Development Company, although I had shown Mr. Conway lands similar to these in Union county and had intended to purchase the same for the company in accordance with my contract with the company of date September 29, 1910. The contract of date December 18, 1911, being Defendant's Exhibit "O," rescinded, of course, all of the other contracts which had been made by the company and myself prior to that time. In my opinion, 85 per cent of the lands for which the corporation now has deeds consist of good agricultural and fruit lands.

The 94 auction contract holders who were transferred to straight acreage contracts owed at the time they were transferred upon their contracts a total of \$14,900, being an average of \$148 yet due upon each auction contract. The balance due from these auction contract holders to the company at the time of the transfer amounted, of course, to more than the company had either paid or agreed to pay to me for these lands.

The letter which you show me, of date October 5, 1910, and the letter which you show me of date Sep-

tember 16, 1911, were both received by me through the agency of the United States mails and are from the Oregon Inland Development Company.

Whereupon the two letters were offered in evidence and they were received and marked as Complainant's Exhibit One hundred twenty-three and Complainant's Exhibit One hundred twenty-seven.

Whereupon Dr. F. W. Whiting, E. G. Bailey, H. L. Willis, N. P. Parks, O. L. Maxwell, C. A. Galloway, C. S. Rice, F. D. Smith, A. J. Colt, C. T. Colt, D. Sommer, E. L. Harris, J. T. Phy, L. A. Stoop and E. M. Coombs, each testified for the defendant in substance that the lands in Union county, owned by the Oregon Inland Development Company, were good for agriculture and horticulture.

John Beletich testified that he was a contract holder and was one of the straight acreage contract holders. He had examined the property upon which his tract of land was situated and was satisfied with it and had subsequently purchased other tracts.

S. B. Wilkins testified that he had been an agent of the Oregon Inland Development Company and had sold many contracts. He had purchased 20 acres from the company of the land that it was advertising in Union county; that the land was all that it was represented to be in the literature and representations of the company. He was frequently at the office of the company and transacted all of his business with either Conway or Richet and Riddell did not take any part in the business

transactions with him. "The \$400 check testified to by Miss O'Gara as having been ordered drawn by Riddell, was received by me in the mails when I was at Lincoln, Nebraska, and was cashed by me at Lincoln, Nebraska. I did not see Riddell in the transaction. I talked with Conway and Richet. The smaller check shown, bearing date March 10, 1911, was received by me before I came to Oregon and was cashed by me at the Merchants National Bank in Portland, Oregon. It was in payment of commissions which I had earned."

John Walter testified that he was a civil engineer; that at the instance of Conway and Richet, subsequent to their indictment, he had examined the auction contract lands of the company in Union county and that the said lands were fairly fit for agriculture and horticulture. He produced, and there were offered and received in evidence, without objection, a package of photographs which were marked as Defendant's Exhibits "P" and "Z," inclusive. The witness testified that he had taken these pictures upon the deeded lands of the said company and that they truly and correctly showed and depicted scenes thereon.

M. G. Munly, Dr. A. J. Giesy, John A. Bell, C. R. Davis, Frank B. Riley, Judge J. P. Kavanaugh and E. Versteeg each testified that he had known the defendant Riddell for many years and knew his reputation in the community for honesty and integrity, and that his reputation in the community was good. W. S. Chapman testified that he was well acquainted with defendant, and had been in his office many times during the summer

of 1911; that he knew from his personal knowledge of defendant's business that he gave no time to the conduct of the company's business. That at one time Frank Richet had told witness that Riddell had no interest in the company and was only acting as its attorney.

Edith C. Bayley testified that she was a stenographer and bookkeeper for the Oregon Inland Development Company in the winter of 1909 and 1910; that during the time she was connected with the company she conducted all its correspondence and kept its books; that defendant had no direction of the affairs of the company and only performed such legal duties as were required by Mr. Richet and Mr. Byrne the then manager of the company. Mr. Riddell was seldom in the office of the company and only came when sent for to sign some paper or for some legal matter.

Guy Rogers testified that he was often in the office of defendant; that on one occasion Conway had told witness that Riddell had no interest in the company and was merely a hired attorney paid to do the legal work of the corporation. John Hardin testified that he was a client of defendant and was often in his office. His knowledge of defendant's affairs was intimate; that defendant was not actively connected with the management of the company. Conway had told witness that defendant was a hired attorney for the company. John Hanthorn testified that in 1910 he had desk room in the office of the Oregon Inland Development Company and was familiar with its business; that defendant was sometimes in the office but did not take any active part in the

management of the company's business; that Frank Richet, the president of the company, had often remarked that defendant had no interest in the company and was simply an employe of the company.

C. W. Riddell testified that he is a brother of defendant; that he occupied an office with defendant in the Chamber of Commerce Building in 1901 and 1910 and when the Oregon Inland Development Company was organized; that he heard much of the talk between Richet, Byrne, Markillie and Upton regarding the organization and understood from what they said that defendant was not to have any actual interest in the company, nor be engaged in its management, but was to perform legal services for which he was to be paid a compensation. Conway had informed witness that defendant had nothing to do with the management, or letting the contract for the survey of Orindale; that Richet and Conway managed the affairs of the company; witness wanted the work of surveying Orindale; defendant was asked to try and get the job of surveying Orindale for witness, but was not able to influence Richet and Conway, who had made other plans.

J. T. Conway, being sworn, testified that he was the general manager of the Oregon Inland Development Company, and came into the company in March, 1910. He purchased his stock from Veasen, Markillie and Byrne, and assumed charge in March, 1910, and had entire control of the corporation. Witness prepared and attended to the printing of "Success" and all subsequent literature. He did not submit any of

the literature to Riddell, nor show it to him after publication. Riddell was the company's attorney and was employed to transact the legal business and to act as secretary. He was paid \$50.00 per month for the work that was required of him. He was not consulted about the business. During 1910, Conway and Richet developed several schemes and plans for selling lands in connection with the business of the company, knowledge of which was kept from Riddell. Some of their legal work was done by Henry Collier. The contract between Conway and the company was prepared by Collier after the terms had been agreed on between Conway and Richet. Riddell was not consulted about the contract and simply signed it as secretary when requested. The letters containing the printed signature of Riddell were prepared by Conway, and printed. Riddell was not consulted about them. Conway obtained Riddell's signature and had a rubber stamp made. The printed signature was made from the rubber stamp. Riddell did not know that the printed signature was used. He afterward learned of the stamp and demanded its return. It was not used thereafter, with his knowledge.

Conway, during the summer of 1910, went to La Grande to examine some tracts of the Veasen lands. He did not like them and made arrangements with Hibberd and Phy to buy other land in Union County and the adjoining counties. Hibberd came to Portland, and on September 29, a contract was executed with Hibberd for the purchase of the Palmer lands in Union County. A second contract was executed with Hibberd October

17, 1910 for 15,000 acres of land in Union, Baker and Wallowa counties. These lands were to be good fruit lands unimproved. The title to the Palmer lands was examined by Riddell who found it defective. All sale of the Veasen lands was then stopped and all contracts that had been sold were transferred to the Union County lands as fast as possible. Circulation of Success was stopped, and literature descriptive of Union County prepared and sent out. "Famous Fruits" was prepared first, followed by the booklet with the red apples on the cover, and later by the poster. Riddell was not consulted about any of this literature. It was not shown to him before it was printed. He was not consulted about the mailing or distribution of any of it. Riddell was told by Conway, Richet and Hibberd that the Union County lands were good fruit lands. He had no knowledge of them other than what he got from us. Hibberd and Conway prepared the map showing lands in Union, Wallowa and Baker Counties. Riddell knew nothing of it. Hibberd agreed to buy lands in the territory outlined in red. The negotiations with Hibberd were made by Conway and Richet. Riddell was not consulted. In November, 1910, his duties were outlined in a written contract. Conway had this prepared by Collier. Richet afterwards wanted to cancel it and dispense with Riddell's services, thinking the work could be done cheaper. Conway held a majority of the stock and insisted on retaining Riddell. Riddell examined numerous abstracts of title to the lands in Union County. Riddell was not consulted about any purchase. Richet and Conway arranged for the purchase of the land at

Klamath Falls. Riddell was not consulted. He was told that the land was suitable for town lots. The Hayward letter (exhibit 119) was prepared by Conway. It was not shown to Riddell. He knew nothing about it. He did not know that it was mailed. The clearance receipts (set out in counts 4 and 5 of the indictment, exhibits 41 and 42) to E. H. Bryant, and J. K. Hartline, were taken by Conway to the office of the Northern Trust Company and left there for registration. No directions were given for mailing them. Riddell did not know what disposition was made of them. Riddell did not have a key to the office, nor access to the books and papers of the company. During the day he had the use of the company's large room for reception purposes. The seal of the company was not in Riddell's custody; he did not have access to it. He rented his office from the company.

Upon cross examination, the witness testified that the Oregon Inland Development Company did not own any lands to which it had title in either Baker County or in Wallowa County. He further testified that he and Richet had been indicted and convicted upon a similar indictment to the one upon which the defendant Riddell was being tried and that subsequent to the service of his sentence he had been pardoned. With the proper foundation laid for each impeaching question he was asked if he did not, at the former trial, testify as a witness under oath that he was not the general manager of the Oregon Inland Development Company and if he did not at that time deny that he was the general manager; also if he had not, at the former trial, testified that the

only thing he had to do with getting up the issues of "Success" was to permit his name to be put upon the outside cover; also if he had not, at the former trial, as a witness denied responsibility for the advertising literature entitled "Success," and had testified in regard to this that there were attorneys connected with the company who should be responsible; also if he had not, at the former trial, testified that he had no authority to act in any matter except under direction of the board of directors of the Oregon Inland Development Company; also, if he had not testified, at the former trial, that it was the intention of the company to send Mr. Riddell down to Florida in order to learn a proper method of the disposition of the lands to the auction contract holders; also, if he had not, at the former trial, testified that Mr. Riddell had worked out the plan by which, providing that a smaller number than 3,086 contracts had been sold, the number of the larger contracts which would have to be deeded to the auction contract holders was determined; also, if he had not testified, at the former trial, that the defendant Riddell was the owner of six shares of the capital stock; also, if he had not testified, at the former trial, that Riddell had prepared a letter and suggested to the witness that each contract holder be advised that the reason for changing from the Veasen lands to the Union County lands was that a projected railroad into Union County would make the Union County lands more valuable; also, that if he had not testified, at the former trial, that in regard to the purchase price of the lands those matters had been figured out by Mr. Riddell; also, if he had not testified

at the former trial relative to the piece of literature, Complainant's Exhibit 31, entitled Grande Ronde District, Oregon (showing picture of three red apples) that Riddell had examined it and stated that the pictures were not very pretty and that better pictures ought to be put in the book. The witness having in each instance either denied that he had so testified at the former trial or having stated that he could not remember, the government, upon rebuttal, impeached the witness by showing that he had given, at the former trial, all of the testimony claimed and indicated in each, every and all of the foregoing impeaching questions.

Upon direct examination, the witness having testified that he had never examined the Veasen lands prior to October, 1910, was shown on cross examination a letter under date of July 27, 1910, written to the witness by Ethel M. Brodhagen, together with a carbon copy of the reply thereto, of date August 2, 1910, and the witness admitted that he had received the letter and had answered it as per the letter of August 2, 1910. These two letters were then, by the government, offered in evidence and received and marked as Complainant's Exhibit 128-A, and Complainant's Exhibit 128-B. To the introduction of each of these letters the defendant objected on the ground that it was incompetent, irrelevant and immaterial. In each instance the objection was overruled, and the defendant asked and was allowed an exception.

W. D. Fenton testified that it was a common practice for attorneys to act as director and secretary in

corporations for their clients, where they had no actual interest.

Upon cross examination the witness testified that the practice, of course, would depend a great deal upon the kind of a corporation that it was, and that it would not be a common practice for attorneys to act as a director or as secretary of a corporation which was not engaged in a legitimate business.

Mrs. Helen Glover testified that she was a stenographer in defendant's office in 1909 and until the summer of 1910. She was in his office at the time the Oregon Inland Development Company was formed, and prepared the papers at the direction of Mr. Upton, who was occupying the same reception room with Mr. Riddell at the time. Mr. Riddell looked the papers over and suggested some alterations, which Mr. Upton told me to make. I was at the time very familiar with Mr. Riddell's affairs and took care of all detail work in connection with his business. I was completely in his confidence. I knew the men who organized the company from meeting them in the office. Mr. Veasen talked with me often, and I understood from him that the lands were good. I think Mr. Riddell had the same idea that I did. I was often in his private office while the corporation was being organized. After it was on a going basis I knew less about it, as the officers were in our office less. They came in when they wanted checks signed or papers executed. Mr. Riddell's position as secretary and director was merely nominal. He signed checks as a routine matter. I heard him object

once to signing a check because Mr. Richet had not signed it. Mr. Riddell was very much occupied with his professional business and did not give the company's affairs any attention other than to perform the duties required of him and for which he was paid. He had a number of important cases in court while I was in his office. I never saw any of the company's literature in our office and know that Mr. Riddell was not in their office very much. He was too busy and I would have known, for I always knew where to phone for him when he was needed. He spent much of his time in court and in the library. This was not the only corporation in which he acted as secretary and as one of the directors.

Defendant testified in his own behalf; that I assisted in organizing the Oregon Inland Development Company in November, 1909, performing some of the legal work; Markillie, Byrne and Veasen were introduced to me by Upton whose clients they were. The company was organized to exploit and sell a large tract of land owned by Veasen. Veasen desired to exercise control of the company but did not wish the stock to be in his name. At his instance I subscribed for six shares of the capital stock, for him, and was elected a director to represent his interests. I was also made secretary to keep the records, for which services I was paid a compensation. I did not prepare any of the literature of the company, and did not see any of it before it was sent out. In March, 1910, Conway made an arrangement with Veasen and Richet by which he became the owner of some stock, and he and Richet acquired substantially all of the stock of the company. Conway

was made general manager and took control of the company's business. I did not know anything about the lands of John Veasen other than what he and others told me. I was told that they were excellent for fruit raising. I was not present at the first stockholders' meeting. I did not write or prepare the record of the first meeting. I did not have any interest in the contract with Veasen. I did not prepare the deeds, but knew that Veasen had executed and had in the company's office a large number of deeds conveying lands to the Oregon Inland Development Company. I understood and believed that these deeds had been deposited in escrow in the Lumbermens National Bank. I understood that a large acreage of these lands was near Sheridan in Polk County, Veasen so stated. I signed such papers as were required to be signed by the secretary of the company and wrote up the records of the board meetings that I attended, and also where memoranda were kept of meetings that I did not attend. I had no reason to believe the lands were poor. I had every confidence in Mr. Richet, knowing that he was a merchant of many years standing in Portland, and would not engage in an unsound business. After Conway took charge of the company's business all literature was prepared and sent out under his direction, as I supposed. I did not see any of it. None of it was submitted to me. I saw some pieces of literature at times and had some superficial knowledge of it. I remember the booklet with the three red apples on the cover and the large poster. At the time I saw the poster Hibberd, Conway and Richet all said that the pictures on it

accurately represented the lands of the company; that they were pictures taken on the lands as they were described. During the winter of 1910 and 1911, I was busily engaged in professional work, trying a number of difficult cases. One case in particular against the Pacific Railway and Navigation Company was on trial forty-three days; another in the U. S. Land Office at Vancouver required 20 days' trial work. Then a large amount of time was consumed in library work, and in preparing evidence. During this whole time I was in my office but little. I signed many checks, clearance receipts and other papers that required the secretary's signature. They would be brought to me and I would sign them as Mrs. Dean would request, without asking what they were, but knowing that they were merely routine matters for which I was paid. In November, 1910, I entered into a written contract with the company for this work to act as secretary and attorney for a compensation of \$50 per month. This contract represented my entire interest in the corporation.

The contract was produced and identified by the witness and offered in evidence and received and marked exhibit AA.

I never exerted any authority as a director, nor knew what the company was doing in more than a general way. The certificate of stock for the six shares that I subscribed for John Veasen, was indorsed over to him sometime in 1911. I cannot tell the date. I kept no record of it. The transfer was never noted on the record book, for the reason that the certificate was never pre-

sented for cancellation, and until it was surrendered, and a new certificate requested, no change would be made. The records of the company were not in my possession; they were kept in the company's office; I did not have a key to the office, nor know the combination to the safe, not have access to the records, books or papers of the company. I did not keep the seal. I did not know that such persons as W. C. Hayward, J. K. Hartline, or E. H. Bryant existed until I saw their names in the indictment. I had nothing to do with mailing the letter to W. C. Hayward, nor did I know that the clearance receipts to E. H. Bryant and J. K. Hartline, were mailed, or what was done with them. I did not at any time direct the mailing of any of these documents, and had no knowledge that they were ever mailed. I rented my office room in the Yeon Building from the company and the compensation paid me just about satisfied the rent, charge and the telephone. I examined the abstracts of title whenever required by the company, and prepared such contracts and papers as directed. I always believed that the lands in Union County were all that they were represented to be. I was told by Conway, Richet, Hibberd, J. T. Phy, T. O. Bird, J. D. Slater of La Grande, and others, that these lands were excellent in quality and well situated for fruit raising. I remember in particular a number of affidavits that were shown me signed by a number of the leading citizens of Union County in which these lands were stated to be good fruit lands. I never saw a tract of land that the company purchased or had under contract. My entire knowledge came from what others said. I relied entirely on the integrity of

Mr. Richet. I understood that Mr. Hibberd was a business man of excellent standing in Union County and that any lands that he might purchase for the company would be good for the purpose. Mr. Phy, the present county judge of Union County, said that Mr. Hibberd was an excellent judge of lands and that he was reliable. I had no reason to suspect that these lands were other than what they were represented to be until after the government had undertaken the investigation of them. I prepared many of the contracts of the company at the direction of Conway.

Upon cross examination the defendant testified that the form letters of the company were sometimes submitted to him for approval; that is, for an examination relative to the grammar, before they were sent out, and that before he could make these corrections, if any were required, it would be necessary for him to read them. He could not say how many of the form letters were submitted to him and could remember only one distinctly. There might have been a great many more but the witness could not remember.

The clearance receipts were submitted to the witness before they were mailed. They had to be signed by the witness before they could be mailed. The witness knew that the large majority of the contract holders of the Oregon Inland Development Company lived at points outside of the city of Portland, Oregon, and that as to these necessarily these clearance receipts would go to them through the agency of the United States mails, and that they would be mailed at Portland, Oregon; that if the

witness had not signed the clearance receipts they would not have been transmitted to the auction contract holders; that the signature of the witness was a part of the procedure by which the contract holder received his clearance receipt through the United States mails; that the witness read the clearance receipts before he signed them.

The attention of the witness was directed to the fact that the clearance receipts recited that there were 3086 tracts of land and 3086 lots in the town of Klamath Falls, Oregon, and that he knew that this statement was in the form before he signed them; that he did not know where the 3086 tracts were nor where the several subdivisions of the lands into ten acre, twenty acre, forty acre, eighty acre, one hundred sixty acre, three hundred twenty acre, and six hundred forty acre tracts were. Necessarily, after the change to Union County lands, they would have to all be located within Union County. The witness further testified that he was the secretary and director of the company, and if any of the contract holders had presented to him one of these clearance receipts calling for the 3086 tracts, and the 3086 lots, he would have told them that he did not know where the lands or the lots were, and that they should go to the general manager of the company for the information; that after the Veasen contract was canceled the witness knew that the company did not own 40,000 acres of land, and that all they had was a contract with Hibberd for the purchase of approximately 17,000 acres; that the witness did not know how many contracts the company had sold.

The attention of the witness was directed to the fact that when the tracts were first being issued the numbers started with number 501 instead of with the number 1; that he had sent contracts as early as April, 1910, but that he could not say whether or not at that time he knew of this arrangement. His attention having been directed to the fact that he had signed contract number 522, he then testified that he knew at that time that the company had not sold five hundred twenty-two contracts.

The attention of the witness was directed to the big red poster and he testified that he probably saw it soon after it was published, or soon after it was printed, but as to when it was sent out he had no recollection. He testified positively that he had not assisted Mr. Conway in any way in the preparation of this piece of literature, but that there was a possibility as to some of the literature that he may have changed the grammar, or the punctuation, or the rhetoric upon it; that he had seen the big red poster in the office of the Oregon Inland Development Company, and that he had read it and looked at the pictures; that if he went into the office and they had the literature out the officers of the company would show it to him and that he would look at it; that perhaps he would see the principal things in it and perhaps not, but that he probably did; that he knew that the literature entitled Grande Ronde District, Oregon (three big apples) carried his name upon it as secretary of the company, and that he also knew that some of the other advertising literature carried his name as such officer.

The witness testified that he supposed that the company owned lands in Baker County and knew that the literature of the company had been prepared for the purpose of inducing sales; that he also knew that the only contract which the company had for lands in Baker County was contract of date October 17, 1910, being Defendant's Exhibit E; that the witness had examined all of the abstracts of the Oregon Inland Development Company for it and of course knew that he had never passed on any abstract for any lands situated in any other county than Union County; that the witness never knew of the company ever having directly purchased any lands in either Baker or Wallowa Counties, and that it was his belief and understanding that all of the lands the company had bought and taken title to were confined strictly to Union County.

With reference to the first issue of the literature entitled "An Oregon farm for only \$150," the witness testified that he could not recall this piece of literature, but that it might have been submitted to him; that he might have known that the piece of literature was being circulated; that he would not say absolutely whether he did or not; that if he had the facts had escaped his memory in the lapse of time.

Relative to the issue of "Success" the witness testified that it is quite probable that he saw this piece of literature after it was issued, but he does not know whether he read it or not; he would not say that he had not read it; that it would be a difficult matter for the company to be sending out literature in large quantities over so long

a period of time without some knowledge of it coming to the attention of the witness, and that when it did come to his attention it is quite probable that he would read it, although he would not say positively because he could not remember.

The witness denied any knowledge of the circumstances testified to by the witness Ella O'Gara as to the change of the name upon the second issue of "Success" from Jay Upton to J. T. Conway.

Questioned as to how many copies of the issue of "Success" that he had ever seen in the office of the Oregon Inland Development Company, the witness testified that he could not swear positively that he had ever seen a copy of it until he was on the stand at the previous trial of Conway and Richet. As to the question as to whether or not he knew that between March, 1910, and September, 1910, approximately 5,000 copies of the issue of "Success" was being distributed through the mails he testified that although he signed most of the checks of the Oregon Inland Development Company he would not say positively whether or not he knew that this piece of literature was going to the public in those quantities; that he would of course presume when the checks were presented to him in payment of bills to printing concerns that it was for some kind of advertising literature, but that he had nothing to do with examining the literature or even with examining the name of any of the publications or as to whether or not the bill was correct.

The attention of the witness was directed to page 5 of the issue entitled "Success," and the following statement from the literature was read to him:

"Our lands comprise many sections of choice lands, level and free from timber growth; these lands are ready for the plow, but many sections have small patches of timber upon them, yellow pine, fir and tamarack. The open land is covered in summer with a thick growth of wild hay of high and nutritive value for fodder. Stock thrive upon it. The land is also fruit land of the highest quality. This has been proved by the early home seekers who settled in these vicinities years ago. These people set out young trees and today have bearing orchards which cannot be excelled in the famous fruit regions anywhere in the United States."

The witness testified that if he had read that statement he would have had every reason to believe it to be true; that he did not know what land it related to but that his knowledge of the lands came from the people who prepared the advertising literature; that he knew these people and believed the representations to be true, if, in fact, he read them; that if he had read the statement prior to October 1, 1910, he would have believed that the lands were ready for the plow and that John Veasen, the owner of the lands, had told him so. John Veasen, the witness testified, is now dead.

The witness further testified that Veasen had not told him how many acres of the land were ready for the plow

and that he would not swear that Veasen had ever said that any of them were ready for the plow.

Since the publication of the literature the witness testified that he had learned that the Veasen lands were the same lands as the Jones-Mays lands; that at the time the company started out he did not know that these lands comprised lands all located in school sections 16 and 36. Concerning this, the witness testified as follows:

“Q. Did you know that these lands comprised thirty-five or forty thousand acres all located in school districts 16 and 36?

A. I didn't know it at the time they started out; I learned it later on.

Q. How long afterwards did you learn that these were all school lands?

A. I can't say; I can't pick up details like that and carry them all in my mind all these years, but I know it was sometime afterwards.

Q. Sometime during the summer of 1910?

A. I would say so, yes, but just when, or where, I won't put my finger down on any day or time or within several weeks of any particular time, attempted to be testified about.

Q. Of course, if you had known they were Jones-Mays land you would have known they were worthless?

A. No, I wouldn't have known it entirely; but would have reason to suspect many of them were worthless.

Q. And a great majority of them on top of

mountain peaks if known they were the Jones-Mays lands?

A. I won't say on the top of mountain peaks, but I would have known or had a good deal of reason to suspect that a large area of that were in mountain regions.

Q. And you knew during the summer of 1910 then, two things; that these tracts of 35,000 acres of land were in sections 16 and 36, and second, that a large quantity consisting of thousands of acres of lands located in sections 16 and 36 were also the Mays-Jones lands, didn't you?

A. Well, I won't say when that information came to me, but it did at some time, but I won't fix any specific time for it.

Q. You always knew, ever since you started in to practice law, that sections 16 and 36 were school sections?

A. Certainly.

Q. You knew in the summer of 1910, and for several years prior thereto, that the Jones-Mays land comprised thousands of acres of sections 16 and 36?

A. Well, as far as my general information went, that the Jones-Mays lands were sections 16 and 36, because they were acquired from the state; that was a matter of public notoriety around here.

Q. Everybody knew that?

A. Everybody knew, and happening to know both Jones, and knowing Mays very well, having

read law in his office, of course I knew something about it."

The witness further testified that he had read law in the office of Mr. Jones in the year 1890 and the year 1891; that at that time he did not know that the Jones lands were located in sections 16 and 36; that he did know of this fact prior to 1910 on account of the land fraud trials conducted in Portland and a matter of general notoriety some years before that date; that the witness could not say positively when he first found out that the Veasen lands were the Jones-Mays lands, but that it was perhaps some time in the fall of 1910. The witness could not recall the circumstances under which he had made the discovery. The witness testified that he had never gone to a map of the state of Oregon for the purpose of examining it to see where any of the Veasen lands were located; that an accurate sectional map of the state would have shown all of these lands to have been located within high mountains providing the map was drawn to a scale; that, however, there were not many such maps of the state from which such an examination could be had; that the general land office maps would be too small for that purpose; that the witness had originally subscribed for six shares of the capital stock, and that he had made the entry noting that fact; that the stock remains upon the books of the company apparently in the name of the witnesses, but that in reality it was transferred to John Veasen. The witness could not state when, where or under what circumstances the transfer was made and said that after the transfer had been made he owned no stock in the cor-

poration, although he continued to act as a member of the board of directors.

The witness was shown an agent's contract of date March 4, 1911, signed by Richet and Riddell being Complainant's Exhibit 40, and testified that he executed the contract on behalf of the Oregon Inland Development Company, and that from the style of the language used and employed, the witness was of the opinion that he had prepared the contract; that he had never made any investigation of the representations that were made by the Oregon Inland Development Company for the purpose of inducing the sales of their auction contracts. That when the contract of date October 17, 1910, was entered into the witness did not know whether the company had on hand \$500 or \$5,000 or \$10,000, and that he had no knowledge at all and would not attempt to state as to how much they had; that if he had given any thought to it at all he would have known at that time that all of the lands which the company had any interest in were described in the contract of date October 17, 1910, and that the only assets it had on hand was the cash on hand and the balance due upon their auction contracts, all of which of course were redeemable in land.

Whereupon the defendant rested.

Whereupon the government rested.

The statement of evidence contained in this bill of exceptions does not contain all the evidence which was introduced at the trial. But does contain all the evi-

dence relating to the mailing of complainant's Exhibit number 41, complainant's Exhibit number 42 and complainant's Exhibit number 119.

Whereupon, following the arguments of counsel, the court instructed the jury as follows:

"Gentlemen of the Jury:

You have sat here for almost two weeks listening patiently to the testimony in this case and to the argument of counsel. I now ask your attention while I state to you the issues you are to try and the rules of law by which you are to be governed in arriving at your verdict.

The defendant, H. H. Riddell, is on trial before this court and jury charged with a violation of section 215 of the Federal Penal Code, which, as far as material to our present purposes provides that 'Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or caused to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any postoffice or station thereof, or street or other letter box of the United States or authorized depository for mail matter, to be sent or delivered by the post-office

establishment of the United States * * * shall upon conviction be punished as in the statute provided.

Now, the indictment in this case was returned upon the 23d day of May, 1914, and charges that the defendant Riddell together with J. T. Conway and Frank Richet, devised and conceived a scheme to defraud one Mrs. Patsy Doran and divers other persons to the Grand Jury unknown, and to obtain from them and each of them money and property by means of false, fraudulent and misleading pretenses, representations, advertisements and promises, and that in the execution of this alleged fraudulent scheme that the defendant Riddell mailed or caused to be mailed in the post office establishment of the United States at Portland, five certain letters which are set out in the indictment, and to which I shall call your attention more particularly hereafter.

Two matters of fact are therefore to be established by the evidence in this case: First, that the defendant Riddell either alone or in conjunction with one or both of the other persons named devised a scheme or artifice to defraud as set out in the indictment, and second, that in the execution of such scheme he deposited or caused to be deposited in the United States Post-office one or more of the letters set out in the indictment.

Now, the indictment in this case sets out with great particularity the nature and character of the

enterprise or scheme which the government claims and alleges to have been fraudulent. I do not think it necessary to take much time by referring to the several allegations in this indictment in detail; they have been referred to repeatedly throughout the trial. It is sufficient for present to say that in general the charge is that the parties named, that is Riddell, Conway and Richet, acting as officers of the Oregon Inland Development Company, falsely and fraudulently represented that such company owned, or had control of some forty thousand acres of land which it proposed to divide into 3086 farms or smaller tracts and offer for sale to intending purchasers at a certain sum to be paid down and certain monthly payments; that it was represented that this land belonged to the company, that it was fruit and agricultural land, that land adjoining the property of the company was all planted in orchard, and many other statements and representations are set out in the indictment as having been made by the defendants either through their correspondence or literature or publications issued by them, and the indictment contains a reference to the names of the publications which it is alleged the officers of this corporation caused to be sent out through the United States mails in large numbers to different parts of this country, and these publications are referred to with great particularity in the indictment, and your attention has been called to them at the trial, such as 'The Grand Ronde District of Oregon' the Native Hay Scene, with certain pictures

and representations thereon, with statements under the pictures indicating the property which they represent. All these matters are set out in detail.

Now this indictment alleges that in the execution of this alleged fraudulent scheme the defendant Riddell mailed or caused to be mailed, as stated a moment ago, five certain letters. The first one stated in the indictment is dated July 12, 1911, and addressed to one A. H. Brobst at Vancouver, Washington; the second is dated Portland, Oregon, February 16, 1912, and addressed to Mrs. F. O. Wesson, City. So far as these two letters are concerned, the government has offered no evidence tending to show that they were mailed by the defendant or caused to be mailed by him, and therefore you are to disregard them in your deliberations. Of the other three letters, one was dated the 26th day of June, 1911, addressed to W. C. Hayward, Manila, Iowa. The other two that it is alleged were sent through the mails are what have been referred to and denominated throughout the trial as clearance receipts, one of date June 9, 1911, in favor of E. H. Bryant of Gallup, New Mexico, and the other dated May 29, 1911, in favor of J. K. Hartline of Albuquerque, New Mexico.

Now, I shall not attempt to review the testimony or allude to it in detail, although I am privileged to do so, I prefer to submit the matter to you unembarrassed by any review or suggestions of mine as to the weight of character of the testimony. You

have heard all this testimony, heard the letters read, heard the circulars read, heard the explanations of the parties in reference thereto, and you are, I take it, in a better position to pass upon the facts and understand the testimony and its purport and effect than I am. I shall therefore not endeavor to guide you in any way in that direction.

Now, it is important at the outset that you should understand in what way the purpose or intent to defraud enters into a prosecution of this character. This court does not have jurisdiction and cannot try a criminal charge ordinarily known as obtaining money by false pretenses. That matter, if it is a crime at all, comes within the jurisdiction of the common law offenses and must be tried in another tribunal. It is, however, involved in the inquiry here because the government of the United States has absolute control of its mails and may provide what matter shall or shall not be carried therein, or what the mails may or may not be used for, and Congress has provided that the mails shall not be used in the execution of a scheme to defraud or a scheme or device to obtain property or money by means of false representations, and it is the duty of this court and jury to enforce this statute when it is shown that it has been violated. It therefore does become important in this case for you to inquire into the nature and character of the enterprise or business in which the Oregon Inland Development Company was engaged and the defendant Riddell's connection therewith, and for that purpose

it is your duty, under the testimony, to determine whether the enterprise was, at the time the letters set out in the indictment were mailed, if they were mailed at all, in fact a scheme to defraud, and if so whether the defendant Riddell was a party thereto.

It is essential to a conviction in this case that it appear first that there was a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent representations as alleged in the indictment; second, that the defendant Riddell was a party thereto, and third, that in the execution of such scheme he mailed or caused to be mailed one or more of the three letters or documents set out in the indictment, and which I have heretofore called to your attention.

Now, to devise, within the meaning of this statute, means to prepare a scheme, to lay a plan, to contrive. A scheme is a design or plan formed to accomplish some purpose. An artifice is an ingenious contrivance or device of some kind, and the term as used in this statute is equivalent to trick or fraud. To defraud implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something which he already has. Fraudulent pretenses, representations or promises within the statute mean such fraudulent suggestions or representations of an existing or past fact, or promise as to the future

by one who knows it not to be true as are adapted to induce the person to whom they are made to part with something of value.

The burden devolves upon the government in this case to establish to your satisfaction beyond a reasonable doubt that the defendant Riddell, either on his own behalf or with the assistance of Conway and Richet or one of them devised the scheme or artifice to defraud or obtain money or property by means of false or fraudulent pretenses, representations or promises, and he cannot be convicted on mere proof that Conway and Richet devised such fraudulent scheme, if they did so, and that the defendant knew of their conduct and failed to protest against it. If he is to be convicted the government must satisfy you beyond a reasonable doubt that he was himself a party to the scheme or artifice described in the indictment, and even if you should find that Conway and Richet devised a scheme or artifice to defraud, or to secure money or property by false or fraudulent pretenses, representations and promises and that the defendant co-operated with them in the acts and proceedings had for the purpose of consummating the fraud, he still would not be liable criminally unless he knew that the scheme or enterprise was fraudulent and consciously participated therein, knowing it to be such. However wide of the mark the representations of Conway and Richet may have been, the defendant cannot be charged with criminal responsibility for them unless he acted in bad faith, and the burden of prov-

ing that he so acted devolves upon the government. The crime with which the defendant is charged consists of two elements; there must, in the first place, be a scheme or artifice to defraud or obtain money or property by means of false and fraudulent pretenses, representations or promises. And there must be in the second place, a mailing of one or more letters or documents referred to in the indictment.

The burden devolves upon the government to show you beyond a reasonable doubt that the defendant was a party to such fraudulent scheme or artifice, and also that he mailed or caused to be mailed one or more of the letters or circulars set out in the indictment. The government is confined in its proof to the allegations set out in its indictment. It cannot claim a conviction by proving any other scheme or artifice than that alleged, nor prove mailing by the defendant of any other letter, pamphlet, circular or writing than those alleged in the several counts of the indictment.

Now, the questions whether the enterprise in which the Oregon Inland Development Company was engaged was a scheme to defraud, or whether, if it was, Riddell was a party thereto, or whether he mailed or caused the letters set out in the indictment to be mailed, if they were mailed at all, are questions of fact to be determined by you, and whatever the court may say about the testimony, or whatever it may have said, if anything, throughout

the progress of the trial is not to be accepted by you as correct unless it conforms to your own judgment, and if at any time the court has indicated or intimated its views on any question of fact or the credibility of any witness, you should disregard it unless it coincides with your own views from the testimony in the case. All questions of fact are for your determination and not the court's. It is the duty of the court to advise you as to the law, and it is your duty to follow this advice, but it is peculiarly your province and duty to find the facts. It is therefore a question of fact for you to determine from all the testimony in the case whether there was in fact a scheme or artifice to defraud or to obtain money by means of false and fraudulent representations and promises, and if there was such a scheme and it continued and was in existence within three years prior to the finding of this indictment, and the mails of the United States were used, as alleged in the indictment in execution of the scheme, there was a violation of the federal statute, and if the defendant Riddell was a party to such artifice or scheme or aided or assisted in its accomplishment, with knowledge of its fraudulent character, then he would be guilty and it would be your duty to so find.

The statute under which this indictment was framed includes every device, artifice or design to defraud by means of false representations, either as to the present or the future. It is intended to protect the public against intentional efforts to wrong

and despoil, and especially to prevent the post office of the United States from being used for that purpose. So that if there was a fraudulent scheme or device entered into by Richet or Conway or either of them for the purpose of obtaining money or property by false or fraudulent representations and Riddell was a party thereto with knowledge of its fraudulent character, then under the statute he was guilty as a principal if the mails were subsequently used, as charged in the indictment and in the furtherance of such purpose.

Now, gentlemen, there is no hard and fast rule by which a jury is to determine whether there was, in a given case, an unlawful or illegal scheme to defraud. Men do not usually deliberately place their intentions in writing when they enter into an illegal device or scheme of any kind, and the best that courts and juries can do when called upon to consider the matter is to determine from the facts and circumstances in the case, from the conduct of the parties, their association together, what they did, what acts they performed, what acts each performed, and from all these determine whether there was in fact such a scheme or artifice or not. And if you can reconcile the testimony in this case upon the hypothesis of the defendant's innocence it is your duty to do so.

Again where two or more persons agree or confederate together to commit an unlawful or illegal act, and where there are several acts together con-

stituting but one crime, each is responsible for the act of the other in furtherance of their common purpose, even though it may be performed in his absence and without his knowledge. If, therefore, you believe from the testimony in this case that there was an illegal, unlawful device or scheme to defraud by means of false and fraudulent representations set out in the indictment, entered into between the defendant and Conway and Richet, or either of them, and that such scheme contemplated the use of the United States mails in its accomplishment, then it can make no difference, as far as the defendant's guilt is concerned, which one of the co-conspirators mailed the letters charged in the indictment if they were mailed at all, or whether he knew that they were mailed or whether he had any knowledge of the contents thereof, if in fact they were mailed by one of the conspirators or associates in furtherance of the unlawful scheme or device to defraud, to which the defendant Riddell was a party, and of which he had knowledge.

Now, as I have said to you there are five communications set out in the indictment and which it is alleged the defendant mailed or caused to be mailed. As to two of these there is no proof, and the testimony in relation to the other three you have heard, and it is for you to determine whether they were mailed in pursuance of the alleged unlawful scheme and in execution thereof. A letter, to come within this statute, must be deposited in the post-office for the purpose of executing the scheme or

artifice to defraud or in attempting to do so, but it is not necessary that the letters or papers mailed be of a nature or character to be effective in carrying out the fraudulent scheme or device. It is enough if, having devised the scheme to defraud, the defendant with a view of executing it deposited or caused to be deposited in the post-office letters or papers which were designed for the purpose of executing the scheme, or to assist in carrying it into effect, although in the judgment of the jury they may be wholly insufficient for that purpose. Nor is it necessary for the government to prove the mailing of all of the three letters set out in the indictment and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was either mailed by the defendant or caused to be mailed by him, and that such letter or document was in fact intended by the parties mailing it in execution or to assist in the execution of the alleged unlawful scheme.

Now, it is important that you should keep in mind, gentlemen, that the defendant is not being tried for defrauding either of the parties who are named in the indictment or any other person, or for promoting or assisting in the promotion of an impracticable scheme or plan. The question is, did he alone or in conjunction with Conway and Richet, or either of them, devise a scheme or artifice to defraud, and having devised such scheme, did it continue down to and within three years prior to the finding of the indictment in this case, and did he or

one of his co-conspirators place or cause to be placed in the United States mail or any station thereof for mailing and delivery one or more of the letters described in the indictment, for the purpose of executing or attempting to execute such scheme? You must, therefore, before you can find the defendant guilty, be satisfied beyond a reasonable doubt, as I shall attempt to define that term to you hereafter, that he devised or assisted in devising such scheme to defraud, and that he or his co-conspirators placed or caused to be placed in the post-office of the United States for mailing and delivery one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention, for the purpose of executing such scheme. The intention of the defendant is the gist of the offense. That is to say, it must appear to your satisfaction beyond a reasonable doubt that he intended to defraud, and in determining that question you should consider the testimony showing his connection with this corporation, his relation to it, the statements and representations if any that were made to him by the officers and agents and promoters of the concern, and the motive or want of motive that may have induced him to engage or not engage in such enterprise.

Now, in order for you to find that the defendant was a party to the scheme or artifice to defraud, if such there was, it is of course not necessary that you should be satisfied or that you should believe

that he himself conceived the idea, if he knew the things that Conway and Richet were doing in sending out the literature of the company, that this literature carried his name as secretary of the company, and that the lands or property of the concern were being pictured in the literature as belonging to the company when in truth and in fact he knew that it did not own such property, and if you further find that he knew these representations were being made for the purpose of inducing the public to invest its money in the land of the Oregon Inland Development Company, then you should take these things into consideration, together with all the other evidence in the case, for the purpose of ascertaining and determining whether or not the defendant was himself a party to the fraudulent scheme. It is not enough to justify conviction that the evidence will satisfy you that the parties in charge of the Oregon Inland Development Company and its business exaggerated the character or quantity of land which they had for sale. You must be satisfied beyond a reasonable doubt that they exaggerated or misrepresented the quality or quantity of the land with intent to defraud the persons to whom they sold contracts. The law presumes that every man intends the natural and probable consequences of his own unlawful acts. Wrongful or unlawful acts when knowingly or intentionally committed cannot be justified nor excused on the ground of innocent intent. An intent to injure or defraud is presumed when an unlawful act which

results in loss or injury is proved to have been knowingly committed. If, therefore, you find from the evidence and beyond a reasonable doubt that there was a scheme and artifice to defraud substantially as set out in the indictment and that the defendant Riddell was a party thereto, that the representations contained in the literature of the company were made with his knowledge, and that these representations were known by him to be false, then the intent to injure and to defraud the auction contract holders of the Oregon Inland Development Company on the part of Riddell may be by you presumed. Acts which involve such consequences when knowingly and wrongfully committed establish not only a guilty intent to injure and defraud but they disclose moral turpitude utterly inconsistent with an innocent intent. It is presumed that every sane person intends the natural and ordinary consequence of his own voluntary act. Applying this rule to the case at bar if you should find from the evidence and beyond a reasonable doubt that the defendant was a party to the scheme and artifice to defraud set out in the indictment, if you should find that there was such a scheme or artifice, and that in the execution of said scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in count three of the indictment, and the circulars set out in counts four and five of the indictment, then he would have violated the statute and your verdict should be accordingly.

Now, evidence has been introduced that the officers and representatives of the Oregon Inland Development Company put into circulation pamphlets and publications containing pictures or photographs, or purporting to contain pictures or photographs or that were represented to have been taken of lands owned by the company, when, as a matter of fact, they were taken of other land which the company did not own. If this is true and you find that it was done deliberately and with a settled purpose and intent to deceive, then it is a circumstance indicating or tending to indicate the character of the enterprise in which the parties putting out such literature were engaged. If you should find, however, that the pictures were intended and understood by the parties as representative or typical of lands owned by the company or which they honestly intended to and could acquire, then the mere fact of the publication and circulation of such pictures would not be sufficient of itself to justify finding that the scheme was fraudulent. The character and weight to be given to these pictures and photographs depends entirely upon the purpose and intent, as you view it from the testimony, operating upon the minds of the parties responsible there or at the time they were printed and circulated. If it was an honest, bona fide attempt to advertise their property or the community in which it was located with no intent to misrepresent for the purpose of misleading and defrauding then it would not come within the statute, but if it was

not, then it would be a circumstance and a strong one for you to consider in determining the nature and character of the enterprise in which these gentlemen were engaged. Mere exaggeration of the quality or character of any article which one has for sale is not necessarily a fraudulent misrepresentation and within any proper reasonable bounds such a practice is not criminal. It is a well-known fact that parties who have anything to sell sometimes have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods or property to be sold, and as I said within any proper reasonable bounds such a practice is not criminal, however reprehensible it may be. In order to be criminal and to come within this statute now in question it must amount to more substantial deception. A certain degree of praise and commendation of one's business and goods is allowed and it is not criminal to indulge in such praise and commendation even to a reasonable degree of exaggeration. But when it is carried to the extent of misrepresenting the facts for the purpose of obtaining the public's money by means of fraudulent representations then it comes under the ban of the statute.

Now, gentlemen, the evidence in this case indicates that the Oregon Inland Development Company at its inception was organized for the purpose of exploiting what have been referred to throughout the trial as the Veason lands. It appears that the

company owned no other land and had no contracts for the purchase of lands other than the Veason lands. It also appears in the testimony, undisputed, that in the fall of 1910 they ceased the exploiting of the Veason lands and transferred their activities to counties in Eastern Oregon and principally to Union County. It therefore appears that all the transactions had by the company and its officers concerning the Veason lands were more than three years prior to the finding of the indictment in this case, and the statute provides that prosecutions of this character shall be begun within three years after the crime has been committed, so that you could not, under any view that you might take of this testimony find the defendant guilty because of his connection with the corporation during the time that it was exploiting the Veason lands, not only because such transactions are barred by the statute of limitations but because the indictment does not allege nor charge that during that time the mails of the United States were used in the execution of the alleged fraudulent scheme. The evidence concerning the organization of this corporation and its transactions during the time that it was exploiting the Veason lands has been admitted and is to be considered by you in order that you may ascertain and determine the nature and character of the business in which these people were engaged and whether or not it was a fraudulent scheme, but even if you should believe that up to the time the parties began operating in Eastern Oregon the scheme was

fraudulent and a violation of the statute, it would not justify you in convicting the defendant unless you should believe further that after the company began operating in Eastern Oregon it continued to maintain and operate as a fraudulent scheme and with intent to defraud the parties with whom it thereafter contracted. The acts set up in the indictment are charged as having been done on a certain date stated therein. The government is not confined in its proof to the dates set forth in the indictment, but it is bound, under the statute of limitations, to prove that the acts of the defendant on which a conviction is asked took place within three years prior to the finding of the indictment. Unless, therefore, you can find from the evidence beyond a reasonable doubt that subsequent to the 23rd day of May, 1911, there was a fraudulent scheme and device, as set out in the indictment, and that the defendant was a party thereto, and that subsequent to that date he mailed or caused to be mailed one or more of the writings heretofore specified in the charge of the court, you must necessarily find him not guilty.

Your inquiry therefore will be largely confined to a consideration of the nature and character of the business in which these people were engaged while they were exploiting the Union County lands, but in determining such nature and character, you have a right, as I suggested a moment ago, to consider the entire transaction, the circumstances under which the corporation was organized, the pur-

pose for which it was organized, how it was organized, how it was conducted, and from that determine whether they were carrying on an unlawful scheme to defraud in exploiting the Union County land, and within three years prior to the finding of this indictment.

Now, the defendant in this case has entered a plea of not guilty. That plea is a denial of every material allegation in the indictment and of every essential element necessary to constitute the crime charged, and imposes upon the government the duty of proving its allegations and these elements to your satisfaction beyond a reasonable doubt before you can find a verdict of guilty. In other words, the burden is not on the defendant to prove himself innocent, but it is on the government to prove him guilty and that beyond a reasonable doubt, and if you can reconcile the testimony in this case consistent with his innocence, then it is your duty under your oaths to do so. On the other hand if you cannot and you believe beyond a reasonable doubt that he is guilty of the crime charged, then of course your duty is plain to find a verdict in accordance therewith.

He comes before you clothed with the presumption of innocence and he is entitled to the benefit of this presumption throughout the trial and until it is overcome by the testimony. It is not sufficient for the government to create in your minds a suspicion or even a belief that the defendant is guilty

of the things charged against him in the indictment. He is presumed innocent until his guilt is established beyond a reasonable doubt. And when I have said at any time throughout this trial that any fact must be established, I have meant always that it must be beyond what is denominated a reasonable doubt. Now this is a term often used, always used in criminal cases. Its meaning is quite well understood and yet it is difficult to define. It does not, gentlemen, mean a mere possible doubt. It does not mean a captious doubt, nor such a doubt as one might conjure up in his own mind based upon the statements of counsel, or his sympathy in the case, or matters of that kind, but it means such a condition of the mind as would make a reasonably prudent man hesitate to act in his own most grave and important affairs. It is a substantial doubt, based either upon the testimony or want of testimony. And if, after you have considered all the testimony in this case, you are not able to say that you have an abiding conviction to a moral certainty that the defendant is guilty of the crime charged, it is your duty to give him the benefit of that doubt and acquit. If, on the other hand, you are so satisfied, then it is your duty to find in accordance with your conviction.

You are also, gentlemen, the exclusive judges of the credibility of the witnesses. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which a witness testified, by his appearance on the witness

stand, by contradictory evidence, or by evidence that he has made statements out of court inconsistent with his present testimony, and in this connection I desire to call your attention particularly to the testimony of the witness Conway. You will recall he testified to certain matters while under oath before you. It was shown by the government that upon a previous trial he had testified, while under oath, to the contrary. Now, this evidence of his former testimony was admitted solely for the purpose of impeaching and discrediting him as a witness in this case and is material only as bearing on the credit to be given his testimony here. What he testified to at the former trial is not proof against the defendant in this case of the statements made by Conway on the stand at that trial. It is only admitted for the purpose of discrediting his testimony, or placing you in a position where you can properly judge of the weight to be given to his testimony here and upon the present trial.

Now, the defendant has testified as a witness on his own behalf. You should apply to his testimony the same rules and tests that you apply to the testimony of each and every other witness that testified in the case, apply to it the same standard, and give it such faith and credibility as you think it is entitled to, keeping in mind the interest that he has in the result of the trial and the probable effect, if any, such interest may have in influencing his testimony.

A number of reputable witnesses have testified that for many years last past the reputation of the defendant for honesty and integrity in the community in which he has resided has been good. This testimony is evidence in his favor and is before you for your consideration in connection with all the other evidence in the case. In all cases in which a person accused of a crime involving dishonesty and want of integrity is on trial, his good reputation for honesty and integrity is properly to be submitted to the jury. The purpose of such testimony is to enable the jury to determine the degree of improbability that a person on trial who possesses such a reputation would have committed such a crime. What weight is to be given to the testimony rests solely with you. Circumstances may be such that an established reputation for honesty and integrity on the part of the defendant would create a reasonable doubt as to his guilt although without such reputation, the evidence in such case would be convincing and justify a verdict of guilty. In another case, however, the circumstances and proof may be such as would require a verdict of guilty notwithstanding an established reputation for integrity on the part of the accused. It does not necessarily follow from the fact that a man has a good reputation for honesty and integrity that he actually possesses these traits of character and the mere possession of such reputation does not render the person possessing it incapable of committing a crime involving dishonesty and want of integrity. It is

within the common knowledge of all of us that many persons bearing good reputations have nevertheless been guilty of crime. While the reputation of the defendant for honesty and integrity is for your consideration as part of the evidence in the case it is entitled to just the weight, no less and no more, which you upon a review of all of the evidence in the case, and the exercise of a sound judgment, would attach to it, and you should give it such weight as you think it is entitled to under all the circumstances of this case.

Now, gentlemen, the defendant is entitled to the opinion and judgment of each individual juror, and as long as any member of the jury entertains a reasonable doubt of his guilt it is duty to vote for an acquittal. I do not mean by this, however, that you should be arbitrary or unyielding because you must compromise your differences as best you can and as far as you can consistent with your oath, but if, after you have carefully considered all the testimony, exchanged views among yourselves, any juror conscientiously entertains a reasonable doubt as to the guilt of the defendant, he is entitled to the benefit of that doubt. Your verdict, whatever you arrive at, must necessarily be unanimous.

Now, gentlemen, I would say in conclusion that the post-office establishment of the United States is a public agency created and maintained by the government at public expense for the convenience of all the people. It is important that this agency

should not be used for the purpose of promoting fraud, and Congress has passed a law prohibiting such misuse of the mails, and it is the duty of courts and juries to enforce these laws whenever and wherever violated, and if you are satisfied from the testimony in this case beyond a reasonable doubt that the defendant has violated the law in the manner and form as charged in the indictment, you should so find in your verdict. On the other hand, if you entertain a reasonable doubt, your duty to acquit is equally plain and mandatory. The government is insistent upon obedience to its laws but does not demand conviction of innocent parties. It asks equal and exact justice at your hands and nothing more, justice for itself and justice for the citizen accused of violating its laws.

MR. McCAMANT: There was one matter as to which I requested no instructions, your Honor, but I think I am entitled to have the Court tell the jury that if a witness shall be found to have testified falsely in any one respect, he or she should be looked upon with distrust as to the remainder of his or her testimony.

COURT: It is a rule, gentlemen, that where a witness is believed by a jury to have testified falsely in one respect or upon one particular matter, the remainder of the testimony is to be viewed by the jury with caution.

MR. McCAMANT: Is this the proper time to take exceptions?

COURT: Yes, you have to take them now.

MR. McCAMANT. I desire to except to the refusal of the court to give each request which I handed up, which was not given, and I except also to the giving of the second, third and fourth requested instruction of the government.

I also except to so much of the charge of the court, if I understood the charge correctly, as held that the defendant might be convicted if the jury should find that there had been a scheme or artifice to defraud to which the defendant had at some time been a party and the scheme continued until within three years of the finding of the indictment, even though the defendant had done nothing within three years to carry into effect the purpose of the scheme or artifice.

COURT: I did not intend to say to the jury that it would necessarily follow that if there was a scheme to defraud conceived and formed more than three years prior to the finding of the indictment, to which the defendant was a party, and that the scheme continued and was in existence within three years, that he would be guilty unless it appeared that he continued to be a party to the scheme.

MR. McCAMANT: I see I misunderstood, Your Honor, and I am not entitled to an exception on that instruction.

I also ask an exception, may it please the court, to so much of the charge that held that if the jury should believe that there was a scheme to defraud and the defendant was a party to it, it would make no difference whether the matter mailed was mailed by the defendant or by some one else, and I except further to so much of the charge as held that the defendant's knowledge or ignorance of the mailing would cut no figure under those circumstances, and—

COURT: That is if there was a conspiracy between him and one other.

MR. McCAMANT: Yes, I understand the contingency under which the Court so instructed the jury. I think the refusal of certain requests of my own covers what I have to say."

Within the time limited by the rule of the court so to do, the defendant requested in writing that the court give the following instruction to the jury:

The jury is instructed to find the defendant not guilty of the charge set forth in count three of the indictment.

The court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

Within the time limited by the rule of the court so to do, the defendant requested in writing that the court give the following instruction to the jury:

The jury is instructed to find the defendant not guilty of the charge set forth in count four of the indictment.

The court refused to give this instruction to the jury and before the jury returned the defendant asked and was allowed an exception to the refusal.

Within the time limited by the rule of the court so to do, the defendant requested in writing that the court give the following instruction to the jury:

The jury is instructed to find the defendant not guilty of the charge set forth in count five of the indictment.

The court refused to give this instruction to the jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The burden devolves upon the Government in this case to establish beyond a reasonable doubt that the defendant, either on his own behalf, or with the assistance of J. T. Conway and Frank Richet, or either of them, devised a scheme or artifice to defraud or obtain money or property by means of false or fraudulent pretenses, representations, or promises. On this branch of the case the jury is instructed that the defendant cannot be convicted on mere proof that Conway and Richet devised such

a fraudulent scheme or artifice and that the defendant knew of their conduct and failed to protest against it. If the defendant is to be convicted the Government must satisfy you beyond a reasonable doubt that the defendant was himself a party to the scheme or artifice described in the indictment and that he caused certain things to be done for the purpose of consummating the fraud.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

Even if the jury shall find that J. T. Conway and Frank Richet devised a scheme or artifice to defraud or to secure money or property by false or fraudulent pretenses, representations, and promises and that the defendant co-operated with them in the acts and proceedings had for the purpose of consummating the fraud, the defendant would still not be liable unless he knew that the operations of Conway and Richet were fraudulent and that the representations held out by them were untrue. However wide of the mark these representations may have been the defendant cannot be charged with criminal responsibility for them unless he acted in bad faith and the burden of proving that he acted in bad faith devolves upon the Government.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The crime with which the defendant is charged consists of two elements. There must in the first place be a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises, and there must in the second place be a mailing of a letter, circular, pamphlet, or other writing by United States mail. The burden devolves upon the Government to show the jury beyond a reasonable doubt that the defendant was a party to such fraudulent scheme or artifice and also that the defendant mailed, or caused to be mailed, some letter, circular, pamphlet, or other writing. The Government must be confined in its proof to the allegations of the indictment. It cannot convict defendant by proving any other scheme or artifice than that alleged in the indictment, nor by proving the mailing by the defendant of any other letter, pamphlet, circular, or writing than that alleged in the several counts of the indictment.

Except as the same may be incorporated in the general charge the court refused to give said instruction

to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The jury is instructed that the evidence introduced by the Government on rebuttal as to the testimony given by the witness J. T. Conway on the previous trial is material only as bearing on the credit to be given Mr. Conway's testimony in this case. The testimony given by Mr. Conway in the previous trial is not proof against the defendant in this case of the statements made by Mr. Conway on the stand in that trial.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

There is no charge in the indictment that a fraud was committed in the manner in which the stock of the Oregon Inland Development Company was treated as paid up. The jury will therefore disregard the contention of the district attorney that this circumstance was fraudulent.

Except as the same may be incorporated in the general charge the court refused to give said instruction

to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The jury is instructed that the defendant cannot be found guilty under the third count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain letter of date June 26th, 1911, signed Oregon Inland Development Company, J. T. Conway, Vice-President and General Manager, addressed to W. C. Hayward, Manila, Iowa, which letter is set forth in the third count of the indictment.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The jury is instructed that the defendant cannot be found guilty under the fourth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate dated June 9th, 1911, in favor of E. H. Bryant of Gallup, New Mexico, which certificate is set forth in the fourth count of the indictment.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The jury is instructed that the defendant cannot be found guilty under the fifth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate of date May 29th, 1911, in favor of J. K. Hartline of Albuquerque, New Mexico, which certificate is set forth in the fifth count of the indictment.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

It appears from the Government's proof that prior to May 23rd, 1911, the Oregon Inland Development Company ceased and abandoned its efforts to market the property which has been known in the testimony as the Veason Lands, and that all acts looking to the marketing of these properties had ceased more than three years prior to the time when the defendant was indicted. The jury is therefore

instructed to disregard all testimony, if there is any in the record, tending to show any efforts and things done by the defendant looking to the sale of the Veason lands.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

It appears from the testimony of the Government that all efforts looking to the marketing of the Veason lands were abandoned prior to the 23rd day of May, 1911. The jury is therefore instructed that a verdict of guilty cannot be based on evidence of anything done by the defendant looking to the marketing of the Veason lands.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The acts set up in the indictment are charged in the indictment as having been done on certain dates therein set forth. The Government is not

confined in its proof to the dates set forth in the indictment, but it is bound under the statute of limitations to prove that the acts of the defendant on which a conviction is asked took place within three years prior to the finding of the indictment. Unless you can find from the evidence beyond a reasonable doubt that subsequent to the 23rd day of May, 1911, the defendant was a party to the fraudulent scheme and device set up in the indictment and that subsequent to that date he took some active step to effectuate the fraud therein charged, and that he mailed one or more of the writings heretofore specified in the charge of the court subsequent to May 23rd, 1911, you will find the defendant not guilty.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

It is not sufficient for the Government to create in the minds of the jury a suspicion or even a belief that the defendant is guilty of the things charged against him in the indictment. A defendant is presumed to be not guilty until the Government has proved beyond a reasonable doubt that he is guilty and the Government must satisfy the jury beyond a reasonable doubt that the defendant is

guilty of each of the things necessary to make out the offense as heretofore indicated in this charge.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

It is by no means unusual for advertisers to exaggerate the merits of those things which they offer for sale and such exaggeration is not criminal unless it is in bad faith. In order to be entitled to a conviction based on the literature circulated by the Oregon Inland Development Company, the Government must show that the defendant caused this literature to be circulated, knowing that the statements contained in it, or some of them, were false in fact, and that he did this with intent to deceive and to induce those receiving the literature to part with their money or property. The Government must further prove that such misrepresentations were material.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The future is always a matter of speculation and opinion. The representations therefore which are sufficient to sustain a charge of fraud must relate to something in the past or present. The jury is therefore instructed to disregard any statements in the literature of the Oregon Inland Development Company as to the future of the properties offered for sale or as to any future events affecting their value.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The value of land is always a matter of opinion and for that reason a statement as to the value of land cannot form the basis of a charge of fraud under the circumstances of this case.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

If the defendant believed the representations of the Oregon Inland Development Company with

reference to the value of its lands to be true, he is entitled to an acquittal.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

And within the same time the defendant in writing requested the court to give to the jury the following instruction:

The jury has already been instructed that good faith is an adequate defense against the charge preferred in the indictment and on this branch of the case the jury is entitled to take into consideration the question of whether or not there was any motive moving the defendant to participate in the fraudulent scheme or artifice set forth in the indictment.

Except as the same may be incorporated in the general charge the court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

It is further certified that the instructions set out herein as having been given by the court to the jury are all of the instructions given by the court to the jury. Before the jury retired the defendant was allowed by the court an exception to the action of the court in giving the following instruction to the jury:

If, therefore, you believe from the testimony in this case that there was an unlawful and illegal device or scheme to defraud by means of false and

fraudulent representations set out in the indictment entered into between the defendant and Conway and Richet, or either of them, and that said scheme contemplated the use of the United States mails in its accomplishment, then it can make no difference as far as defendant's guilt is concerned which one of the conspirators mailed the letters charged in the indictment, if they were mailed at all, or whether he knew that they were mailed, or whether he had any knowledge of the contents thereof, if in fact they were mailed by one of the conspirators or associates in furtherance of the unlawful scheme or device to defraud to which defendant Riddell was a party and of which he had knowledge.

It is further certified that after the court had instructed the jury and before the jury had retired for deliberation the defendant excepted to the action of the court in giving to the jury the following instruction, which exception was allowed :

It is enough if, having devised a scheme to defraud, the defendant, with a view to executing it, deposited or caused to be deposited in the postoffice letters or papers which were designed for the purpose of carrying it into effect, although in the judgment of the jury they may be wholly insufficient for that purpose; nor is it necessary for the government to prove the mailing of all of the letters set out in the indictment and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was mailed by the de-

fendant or caused to be mailed by him, and that such letter or document was in fact intended by the parties mailing it in execution of or to assist in the execution of the alleged unlawful scheme.

It is further certified that after the court had instructed the jury and before they retired for deliberation, the defendant excepted to the action of the court in giving to the jury the following instruction, which exception was allowed:

You must, therefore, before you can find the defendant guilty, be satisfied beyond a reasonable doubt, as I shall attempt to define that term to you hereafter, that he devised or assisted to devise such scheme to defraud and that he or his co-conspirators placed or caused to be placed in the postoffice of the United States for mailing and delivery one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention for the purpose of executing such scheme. 'The intention of the defendant is the gist of the offense.

It is further certified that after the court had instructed the jury and before the jury had retired for deliberation, the defendant excepted to the action of the court in giving to the jury the following instruction, which exception was allowed:

If there was a fraudulent scheme or device entered into by Richet or Conway or either of them for the purpose of obtaining money or property by false or fraudulent representations, and Riddell was

a party thereto, with knowledge of its fraudulent character, then under the statute he was guilty as a principal if the mails were subsequently used, as charged in the indictment, and in furtherance of such purpose.

It is further certified that after the court had instructed the jury and before the jury retired for deliberation, the defendant excepted to the action of the court in giving to the jury the following instruction, which exception was allowed:

It does not necessarily follow from the fact that a man has a good reputation for honesty and integrity that he actually possesses these traits of character, and the mere possession of such reputation does not render the person possessing it incapable of committing a crime involving dishonesty and want of integrity. It is within the common knowledge of us all that many persons bearing good reputations have nevertheless been guilty of crime. While the reputation of the defendant for honesty and integrity is for your consideration as a part of the evidence in this case, it is entitled to just the weight, no less and no more, which you, upon a review of all the evidence in the case, and in the exercise of sound judgment, would attach to it, and you should give it such weight as you think it is entitled to under all the circumstances of the case.

It is further certified that after the court had instructed the jury and before the jury retired for deliberation, the defendant excepted to the action of the court

in giving to the jury the following instruction, which exception was allowed:

If you find from the evidence and beyond a reasonable doubt that there was a scheme and artifice to defraud substantially the same as it is set out in the indictment, and that the defendant, H. H. Riddell, was a party thereto, and that it was a part and portion of this scheme and artifice to defraud that the representations contains in the literature of the company were made with the knowledge of the defendant Riddell, and that these representations were knowingly false, then the intent to injure and to defraud the auction contract holders of the Oregon Inland Development Company, upon the part of the said Riddell, may be by you presumed; acts which involve such consequences when knowingly and wrongfully committed establish not only a guilty intent to injure and defraud, but they disclose moral turpitude utterly inconsistent with an innocent intent.

It is further certified that after the court had instructed the jury and before the jury retired for deliberation, the defendant excepted to the action of the court in giving the jury the following instruction, which exception was allowed:

It is presumed that every sane person intends the natural and ordinary consequences of his own voluntary act. Applying this rule to the case at bar, if you should find from the evidence and beyond a reasonable doubt that the defendant was a party

to the scheme and artifice to defraud set out in the indictment, if you should find that there was such scheme or artifice, and that in the execution of said scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in Count Three of the indictment, or the certificate set forth in Count Four of the indictment at the time and place designated in the indictment, then you should find the defendant, Riddell, guilty upon said counts.

It is further certified that when the jury retired to deliberate on their verdict, they took with them into the jury room all of the exhibits that were offered and received in evidence during the trial of the case.

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, the Judge who tried the above entitled cause in the above entitled court, do hereby certify that the foregoing bill of exceptions correctly states the proceedings had before me on the trial of said cause so far as they are herein set out, and contains all of the instructions of the court to the jury, and truly states the rulings of the court upon the questions of law presented, and the exceptions taken by the defendant appearing therein were duly taken and allowed; that said bill of exceptions was prepared and submitted within the time allowed by the order of the court and is now signed, sealed and settled as and for the bill of exceptions in said cause, and the same is hereby ordered to be made a part of the record in said cause.

It is further ordered that all of the original exhibits introduced in evidence in the trial of this cause and now in the custody of the clerk of the court be made a part of this bill of exceptions and filed therewith.

In witness whereof I have hereunto set my hand this the 19th day of September, 1916.

R. S. BEAN,
United States District Judge.

Filed September 19, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 9th day of October, 1916, there was duly filed in said court and cause, a Praecipe for Transcript, in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above entitled Court:

You will please to print the record for the Circuit Court of Appeals in the above entitled cause:

Print the following:

Indictment (omitting Counts 2, 6 and 7).

Demurrer to indictment.

Order overruling demurrer.

Verdict of jury, including recommending leniency.

Bill of exceptions.

Writ of error, etc.

Assignments of error.

Bond.

Order enlarging time to file printed record in appellate court.

E. B. DUFUR,
Attorney for Defendant H. H. Riddell.

Filed October 9, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, the 16th day of October, 1916, the same being the 90th Judicial Day of the regular July, 1916, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS.

It is ordered that the original exhibits introduced in the trial of the above entitled cause and made a part of the bill of exceptions be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, with the printed record, and that the same be preserved for any use that may be required hereafter in this court.

CHAS. E. WOLVERTON.

Dated October 16, 1916.

Filed October 16, 1916.

G. H. MARSH, Clerk.

UNITED STATES OF AMERICA)
District of Oregon) ss.
)

I, G. H. MARSH, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing printed transcript of record, in the case in said court of The United States of America, plaintiff and defendant in error, against H. H. Riddell, defendant and plaintiff in error, has been prepared by me in accordance with law and the rules of court, and in accordance with the direction of the praecipe for transcript filed in said cause by said plaintiffs in error, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$. for printing said record, and that the same has been paid by said plaintiffs in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this day of, 1916.

Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit.

H. H. RIDDELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

E. B. DUFUR,

for Plaintiff in Error.

C. L. REAMES, U. S. Atty.,

Filed

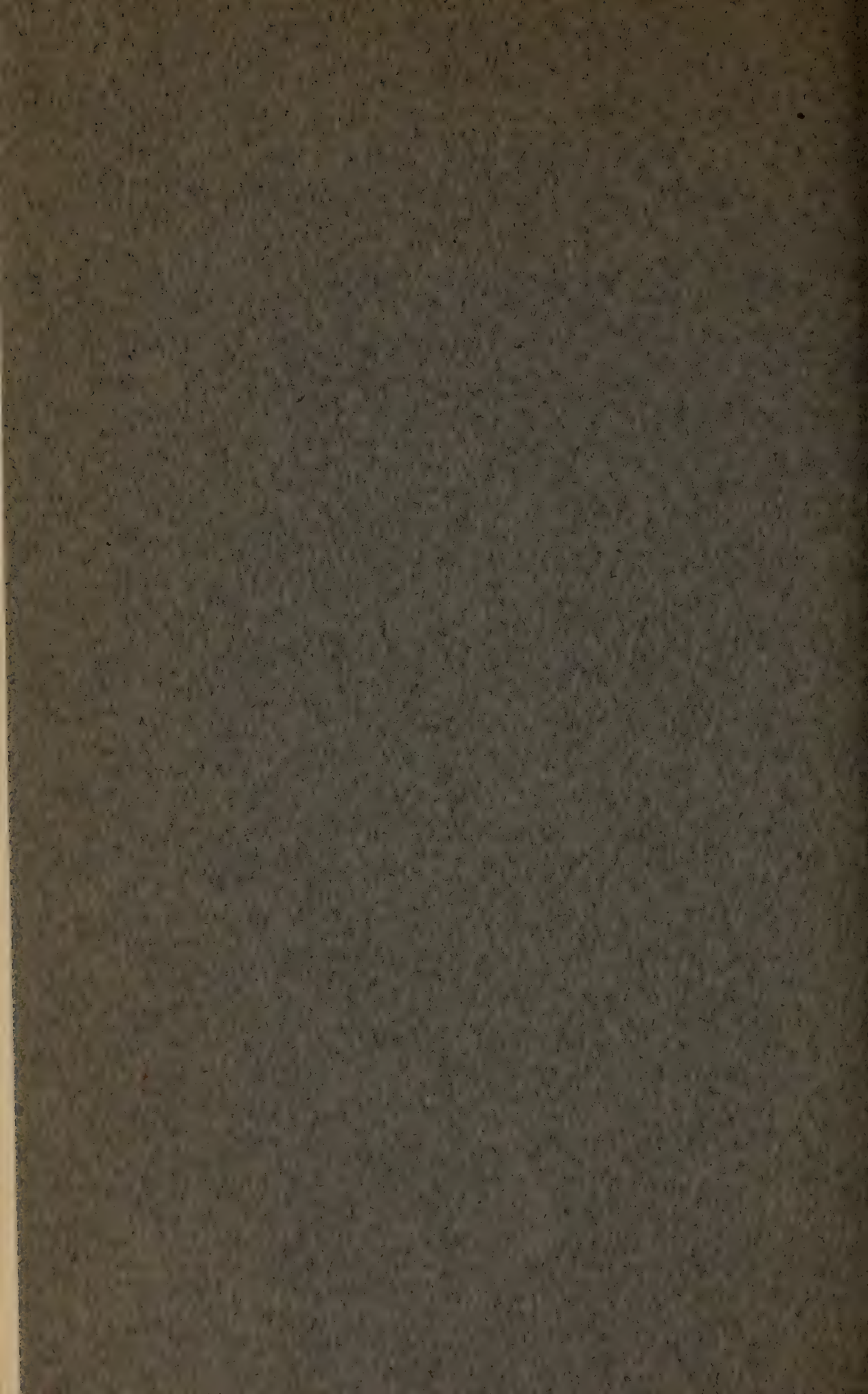
for Defendant in Error.

JAN 29 1917

German Publishing Co.

F. D. Monckton,

Clerk.



United States Circuit Court of Appeals

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H. H. RIDDELL,

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ERRATA.

Page 8.

5th line, for **from** read **form**.

7th line, for **interest** read **intent**.

8th line, for **found** read **formed**.

Page 11.

113 Fed. **8**, should be **854** (2nd citation).

Page 20.

15th line should read: "then and there" the Court using the language of Mr. Bishop quoted in *Blitz v. United States* say p. 156.

Page 23.

3rd line for **indictment** read **inducement**.

6th line for **Supreme** read **District**.

Page 54 should be page 55.

Page 55 should be page 54.

Page 73.

8th line for **depreciates** read **deprecates**.

STATEMENT.

The Oregon Inland Development Company on October 17th, 1910, contracted with C. R. Hibberd of La Grande for the purchase of 15,000 acres of unimproved fruit lands in Union, Baker and Wallowa Counties, which it undertook to sell. The business was negotiated and managed by J. T. Conway the general manager of the company, aided by Frank Richet, president, and Hibberd. Conway worked out plans for selling this land in tracts of ten-acre units. He fixed the price at \$300 for each contract, payable in instalments. Several booklets were compiled by him, descriptive of these lands and the locality. These booklets were entitled, "Fruitdale," "Famous Fruits," "Coming to Oregon," "Grande Ronde District in Oregon" and a poster, and were used by Conway as advertising matter in effecting sales of these lands. Conway and Richet also purchased a tract of land adjacent to Klamath Falls which they surveyed and platted into blocks and lots under the name "Orindale." The selling plan adopted by Conway included one of these lots with each acreage contract. A number of agents were employed to sell these contracts on commission. They were sold over a considerable extent of country. Many were disposed of to persons in the Middle West. After a time the company began making a change in the form of contract, and dropped issuing contracts for an unselected tract, with the lot,

and sold contracts for a definite tract. Conway was experiencing difficulty in arranging for selections and undertook to transfer each outstanding contract to a specified acreage tract. Many were so transferred. One hundred and seventy-eight auction contracts were outstanding when the indictments against Conway and Richet were returned. The company had title to about 2,700 acres in Union County or about 15 acres for each contract, and under the contract with Hibberd were buying additional land from time to time, and improving the holdings. The money received on the contracts was used in payment for lands, so that the acreage was constantly increasing.

Defendant during this time was acting as attorney for the company and was its secretary for a compensation of \$50 per month. His entire interest in the concern was only to the extent of the compensation paid him for his work. This was mostly in examining abstracts of title to the lands which Conway was buying, and preparing such contracts and other papers as the company might require. This compensation was not paid in money, but in office rent and telephone service. Defendant rented his office from the company. The contract under which defendant performed these services is in writing and is in evidence (Exhibit AA, p. 136.) Defendant had not seen any of the lands of the company, his knowledge being confined to what he was told by Conway, Hibberd, Richet and others, all of

which was highly laudatory, and in praise of the excellent character of the lands and its suitability for fruit growing.

The Oregon Inland Development Company was formed in November, 1909. At that time John Veason was the owner of a large amount of unimproved acreage situated in various parts of Oregon. He made arrangements with Frank Richet, W. J. Byrne and W. Markillie to undertake its sale, the company being the agency through which these parties operated. They consulted Jay H. Upton, an attorney, who worked out the details of the plan for them. Defendant was employed to do certain work in effecting the corporation. He, through arrangement with Veason, subscribed for six shares for Veason, and was made a director to represent Veason's interests. Byrne managed the company until in March, 1910, when J. T. Conway, through arrangements with Veason and Richet became manager and acquired the stock that was held by Byrne. Veason, Richet and Conway arranged the distribution. This stock was not paid up in cash but was represented by a contract with Veason for the sale of 40,000 acres of his lands. The only money paid in was such as was needed for actual operating expenses. Conway, on taking charge of the company's affairs, prepared advertising literature and began the sale of these lands. About September, 1910, he discovered the unfitness of these lands for fruit raising, when he abrogated the contract with Veason.

The moneys that had been paid him were forfeited, and the whole project abandoned. An examination of the Grande Ronde District in Union County, disclosed an extensive acreage of unimproved lands with good soil and immune from late frosts, well fitted for raising fruits and for agricultural purposes, that could be purchased cheaply. C. R. Hibberd undertook to purchase these lands for and sell them to the company. A contract was executed with Hibberd on September 29, 1910, and a second one on October 17, 1910, whereupon all contracts then outstanding were taken up and new contracts issued for the lands in Union County. The whole Veason project was dropped. The price of the contracts had been \$240. They were now fixed at \$300, or \$30 per acre, including one of the Klamath Falls lots. The six shares of stock that stood in defendant's name on the books were the property of Veason and not defendant, who had no interest outside of his work and the compensation paid him. Defendant did not at any time participate in the management of the company. He did not have a key to the office, nor the combination to the safe, nor access to the books and papers of the company. Conway managed the business, and in his absence it was managed by Mrs. Dean. She never took any orders from defendant. Defendant did not take any part in the management or operation of the company's business. He worked for the company on a salary and was not consulted about the office business. He was

informed that the lands the company was selling were good. (Record, pp. 9 to 93.) He had no personal knowledge of them.

County Judge Phy, Commissioner Galloway and 13 others of Union County's foremost citizens gave testimony as to the good character of these lands, (p. 124). The bill of exceptions makes it appear (p. 105) that the government proved that these lands were not fit for agriculture or horticulture, but this is not an accurate statement. The draft of the bill of exceptions that the Court signed was prepared by the United States attorney. Just why he saw fit to omit the names of the witnesses who testified as to his contention concerning these lands we do not know. This statement was not discovered until this brief was being prepared. It is, however, not fair to defendant, and is not the fact.

On the trial a great mass of evidence was introduced as to the representations made about the Veason property and the unsavory character of the lands for fruit culture. The introduction of this evidence over the objection of defendant is one of the questions presented. The introduction of the letter in Count Three and the documents in Counts Four and Five were objected to as not having been shown to have been mailed or caused to be mailed by defendant. Counts One and Two were abandoned at the trial.

It is also contended by defendant that the evidence of the government showing non-participation

in the transaction of the company's business entitled him to the requested instructions for acquittal.

Instructions given to the jury to the effect that if Conway or Richet caused the indictment letters to be mailed defendant was responsible from the subject of an exception as do the instructions on the question of interest, and mailing, and the refusal to charge that each count found a separate indictment and that the letter charged in such count to have been mailed could not form the basis of a verdict of guilty on either of the other counts.

The sufficiency of the indictment was challenged by a demurrer, the overruling of which is assigned as error.

SPECIFICATIONS OF ERROR AND ARGUMENT.

Assignment 1, pages 35, 4, 15, 16, 18, 19, 24, 28, of printed record.

The Court erred in overruling the demurrer of defendant to Counts 3, 4 and 5 of the indictment.

In order to set out a scheme or artifice to defraud, the indictment must allege distinctly, and not by inference or implication, every essential ingredient of a scheme adapted to defraud the persons described. Such scheme or artifice must be designed to deprive the persons mentioned of their money or property. The representations must be made with a view of, and with the intent to deprive them of

their money. Something more than a pretense or representation is required. It must be contemplated that the persons to be defrauded would act on the representations, that they would be deceived thereby, and it must appear how, and in what manner the defendant would or could obtain the money of the several persons for his personal use. An intent to damage must appear. Unless the scheme or artifice was intended by the persons devising it to damage the persons mentioned, and deprive them of something of value, it would not be a scheme or artifice to defraud. It need not have resulted in inflicting actual damage, but it must have been intended to accomplish that result; and the indictment should by apt averments directly charge such intention. If the intent to defraud is wanting, an essential element of the charge is missing, without which the pleading is a nullity and of no valid force.

In the indictment here, is no averment of any intent on the part of defendant to defraud. The prolix statements, which render the indictment voluminous, fall far short of charging any intent to defraud any one, or any intent to defraud at all. This intent is a material ingredient of the offense. It is essential to a valid indictment. This has been expressly laid down in all the cases; and in all cases where indictments under this section have been upheld the intent to defraud has been clearly and plainly alleged, as it must be by proper affirmative allegations and not by inference or implication.

8 Enc. Pl. & Pr. 862. No essential element of the offense, such as intent, can be omitted without destroying the whole indictment. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital.

United States vs. Hess 124, **U. S.** 486; **United States vs. Carll** 105, **U. S.** 611; **United States vs. Cruikshank** 92, **U. S.** 542, 556. A crime is made up of acts and intent, and these must be set forth in the indictment with certainty of time, place and circumstance, **U. S. vs. Cruikshank** 92, **U. S.** 558; **U. S. vs. Cook**, 17 Wall, 174; **U. S. vs. Harris** 68, Fed 347; **U. S. vs. Long** 68, Fed. 348; **Miller vs. U. S.** 174, Fed. 35; **U. S. vs. Simmons** 96, **U. S.** 360.

The substance of the offense is the actual or intended injury to the person sought to be reached, the fraudulently depriving him of something that he already has. Mere false and untrue representations are not sufficient in the absence of an intention on the part of defendant actually to deprive the persons mentioned of money or other thing of value. In no reported case is the mere false pretense or representation, apart from an actual intended deprivation of the person addressed of the money, held to be an offense under the section. In all these cases the intended injury to the person sought to be reached, the fraudulently depriving him of something that he already has is deemed essential.

“If there was no intention to deprive, there cannot within the meaning of this section, be an intention to defraud; for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim as against such deceit or artifice.”

Miller vs. United States, 174 Fed. 35. Fraud consists in deception, practiced in order to induce another to part with property. Intent is a material ingredient of the offense. **Durland vs. United States** 161, U. S. 313; **Miller vs. U. S.** 133, Fed. 341; **U. S. vs. Post** 113, Fed. 854. Allegations of fact which fairly show the existence of the essential element of intent is indispensable to a valid indictment. In this case as in all offenses of this character, the intention of the defendant is the very gist and substance of the fraud, which must necessarily be embodied in the scheme as a foundation for the violation of the law. The use of the word “Fraudulently,” or “knowingly” is not alone a sufficient allegation of a fraudulent intent. The circumstances and declared intention must show the act to be such **U. S. vs. Post** 113, Fed. 8. Where the intent is a material ingredient of the crime it is necessary to be averred.

“In fact the gravamen of the offense consists in the evil design * * * * * and a count which should omit the words ‘with intent to defraud’ would be clearly bad.” **Evans vs. United States** 153, U. S. 594.

“The indictment,” says Archbold, “must with certainty and precision charge the defen-

dant to have committed acts under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in the offense be omitted, the indictment is bad. The defect will not be aided by verdict. Actual wrongful intent to deceive, or take advantage; a false representation of fact, made with knowledge of its falsity, and with the intent to induce another to act thereon is always essential." **Rudd vs. United States** 173, **Fed.** 912; **Smith Law of Fraud. Sec. 1, p. 3; 1 Bishop Cr. Law, Sec. 287, 345; (7th ed.); 1 Stark Cr. pl 177 (3d ed.)**

Mr. Bishop says: "It is a rule, universal and without exception, that every intent, like everything else which the law has made an element of the offense must be alleged." **I Bish. Crim. Proc. p. 331, (3d. ed.).**

No intent to defraud is averred in Counts 3, 4 or 5 (record pp. 15, 18, 21); nor does any intent appear in any part of Count 1, although if it did, no reference is made that will serve to carry forward any allegation of intent to defraud.

The several averments of Count 1, after emasculating the allegations having solely an application to the scheme, or enterprise, evolved in 1909 to sell the lands of John Veason, which were shown by the government's evidence to not be included within the period of limitation, nor to be any part of the scheme concerning which the indictment papers were alleged to have been mailed, consist in sub-

stance of averments of representations that the Oregon Inland Development Company was the owner of lands in Union, Baker and Wallowa Counties, and certain lots at Klamath Falls; that the lands would be sold at a certain price, payable in instalments; that literature would be issued and circulated, containing pictures that were false and untrue and a map showing certain townships in which the lands were claimed to be located, and that the lands were not mountainous nor swamp lands; that the company did not own 3,086 lots at Klamath Falls, and did not own any land in Baker or Wallowa Counties and in but six of the townships on the map in the booklet, and that the 10 and 20 acre tracts advertised in "Grande Ronde District" were not orchard lands; but were high, bleak, rough, rocky, frosty, non-arable, non-tillable and inaccessible mountainous lands, and that these facts were known to defendant.

There is no allegation of any intent on the part of the defendant to defraud; nor does the indictment point out how defendant could defraud any one. It must be remembered that the term defraud imports a conclusion only, and the facts from which the conclusion can be drawn, must be shown. It is not shown how, or by what means the defendant would or could obtain money or property by means of the representations and pretenses averred, or by means of the plan or scheme or artifice set out in the indictment. It is not alleged that the defendant bore

such relationship to the company as would put any money into his pocket that the company might receive from selling its lands. Nothing states any plan by which any person would be deprived of money and such money redound to the benefit of defendant, or that he intended to convert any money of any kind to his own use, or that he could obtain any that he could convert to his own use.

The whole material substance of the scheme as set out in the indictment consists of representations alleged to be made by defendant and Conway and Richet with reference to the lands of the company, which are averred to be false, and that defendant knew them to be false. There is an entire absence of any intent to defraud, or any showing as to how, or by what means defendant contemplated defrauding any one, or how he could defraud any one. It is not shown that he did, or could, or contemplated profiting to the extent of a dollar. The most that can be inferred is that any money that should be received for any property sold would go to the company. Defendant could not receive it. There is no allegation that the lands owned by the company were not worth the price asked. It is averred that the Klamath Falls lots were of little or no value, but the indictment is silent as to the acreage property not having a value less than the selling price asked. Much space is taken in describing pictures on the big poster and charging that they were false, fraudulent, misleading and untrue to the knowledge

of defendant. But epithets cannot take the place of averments of fact, which here are as to the character, quality and value of the acreage lands which the company were planning to sell. There can be no successful scheme of this nature unless it contains means for depriving the persons to be defrauded of something, and this must be averred. No essential part or element can be inferred or implied. **Miller vs. U. S. 174, Fed. 35.** If defendant is to be charged with devising a scheme to obtain money or property it must be shown how he could obtain the money, how he proposed to do it. This is not done. There is a total dearth of allegation as to any means by which defendant intended to, or could overreach anyone or deceitfully deprive them of anything of value. We think no case can be found where an indictment has been sustained, under this section which did not show by plain averment how it was contemplated to defraud, and how the persons charged would obtain money or property, and that they planned to convert such money to their own use. We submit that the principles of law governing cases of this kind require the averment of a complete scheme. The averments of misrepresentations with knowledge of their falsity are not enough. It must be shown that the person indicted contemplated and intended depriving some one of something of value, and that it could be done, and how it was planned to be accomplished.

It is essential to the validity of the indictment, that the names of the persons intended to be defrauded be set out or a good and true reason given for not naming them. A scheme to defraud must have for its object defrauding some person out of something of value.

The indictment should set forth the name of the person, to be defrauded, and the omission of such averment will render the indictment void. There can be no complete scheme to defraud, unless some person or class is to be defrauded. **Hendrey vs. United States 233, Fed. 8; State vs. McChesney 90, Mo. 120; State vs. Horn 93, Mo. 190; 2 Bishop Cr. Proc. Secs. 154, 195.** A scheme to defraud necessarily involves a scheme to defraud some person or persons, **Lemon vs. U. S. 164, Fed. 956.** The defendant has a right to be informed by the indictment as to who these persons are, if the grand jury has this knowledge to impart to him. If these persons are unknown to the grand jurors it will be sufficient to allege that fact, **Durland vs. U. S. 161, U. S. 306, 314;** but in no authoritative case is it said that the omission will be allowed if an untrue reason be given. The grand jury have no legal right to withhold averments of fact, going to constitute an essential element of the offense, **Larkin vs. United States 107, Fed. 697, 699.** Such averments are material and must be proved as laid. **Com. vs. Manley 13, Pick 173.** If such allegations were not required it would make no difference whether it were true or false.

It is essential to set forth the names of the parties to be injured, if they are capable of definite ascertainment, unless a good reason be given for their non-specification **2 Whart Cr. Law, Sec. 1396**. The individuals intended to be defrauded should be described by name, or a good and true reason given for the omission, **Larkin vs. U. S. 107, Fed. 699; Starkie Cr. Pl. Sec. 188; U. S. vs. Simmons 96, U. S. 360**. Counts 3, 4 and 5 are each entirely without any allegation of any kind as to the persons to be defrauded; the allegation in each count being that the said defendant

“Having devised and intending to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent representations, pretenses and promises set out in the first count of this indictment to which reference is hereby made, and by which reference the said description of said scheme and artifice to defraud is hereby made a part of this count, etc.”

No allegation is made as to the persons to be defrauded, nor even an inference, and unless the reference back to the first count to the description of the scheme is sufficient to include the words “Patsy Doran and divers other persons to this grand jury unknown,” the counts are bad. While it is not good pleading to refer to a former count in aid of the allegations of another, **United States vs. Jolly 37, Fed. 108,111**, it is now allowable in the Federal Courts, in order to avoid repetition. But to be suffi-

cient the reference must be sufficiently full and explicit to clearly and unmistakably incorporate the matter going before with that in the count in which it is made. **Blitz vs. United States** 153, U. S. 308, 317; **Crain vs. United States** 162, U. S. 625, 633. This, however, is a dangerous practice; because unless care be taken, the reference may not be sufficient to make a complete statement of the offense intended to be charged, **Bartholemew vs. United States** 177, Fed. 905. The reference must be full and distinct, and clearly refer to and point out the particular matter which it is intended to incorporate in the subsequent count. The extent to which a reference may be made from one count to another is limited, 1 **Bishop Cr. Proc.** 431. By all the rules of criminal pleading, where an indictment contains several counts, each count is to be treated as a separate charge and must be complete within itself, except that for some matters subsequent counts may refer to the first or former counts, and if the reference be sufficiently clear and explicit, such reference will serve to incorporate the matter referred to in the subsequent count. But if there be uncertainty or ambiguity in the reference, or if it be not clear and plain that the specific matter is brought forward by the reference, it will not aid the defects in the subsequent count. Thus where a first count set out a larceny of goods of a stated value, and the second count averred a receiving of "the goods aforesaid" the averment of value was not incorporated in the

second count. **State vs. Lyon 17, Wis. 237; State vs. McAllister 26 M. E. 374.** The leading case cited by Bishop and followed in **Blitz vs. U. S. and Crain vs. U. S.** is **Reg. vs. Martin 9, Carr & Payne, 215.** In this case the first count charged an assault on "Esther Ricketts, an infant above the age of 10 and under the age of 12." The second count charged an attempt, etc., on "the said Esther Ricketts," the Court held that the reference to the "said Esther Ricketts" was not sufficient to incorporate in the second count the words "above the age of 10 and under the age of 12." In **State vs. Fields 70, Kan. 391, 394** the words "the aforesaid neat cattle" were held insufficient to transfer to the second count the allegations of number, age, sex, brands and color characterizing the cattle described in the first count. In **State vs. Wade 147 Mo. 73, 76, 47 S. W. 1070,** the reference "by the means aforesaid, at the time and place aforesaid, in manner and form aforesaid," was held not sufficient, and in **State vs. Wagner 118 Mo., 626, 629,** it was held that the words "articles aforesaid" could not draw into a subsequent count the allegations of value in the former count. The court said:

"But though time, place, or person may thus be referred to by the use of the words 'said,' 'aforesaid,' 'same,' etc., yet such manner and means of reference has its limits; it cannot supply descriptive averments which enter into the vitals of the offense **Whart Cr. Pl. & Pr. Sec. 299.**"

In **Powell vs. State** 42 Tex. Cr., 57 S. W. 95, it was held that the name of the defendant could not be supplied by reference to the first count. In **People vs. Smith** 103, Cal. 563, on an indictment for forgery in two counts, the reference in the second count was "the said check was the same check referred to in the first count of this information." The State contended that this was a sufficient reference to bring into the second count the averments of the first count. The court said, p. 565: "The language used will bear no such construction" and held the second count void. In **State vs. Bruce** 26, W. Va. 153, the second count referred to the allegations of time and place set out in the first count by the phrase first count. The court said, p. 565: "The language of Mr. Bishop, quoted in *Blitz vs. United States* say, p. 156:

"The rule is, that the reference must be so full and distinct, as in effect to incorporate the date mentioned in the first count into the second count. I think this has not been done, and that the second counts in each indictment fail to give any date to the offense charged."

In **State vs. Ackerman** 51 La Ann 1209, 26 So. 84, the second count referred to the first by the words "did then and there," etc. The court after quoting the rule of reference from Bishop's new Crim. Proc., Vol. 1, 420-431, say:

"An analysis of the language of the second count fails to disclose anything which can reasonably be construed as an averment of the pur-

chase by the defendant of goods on credit or as an averment that the defendant absconded in order to cheat the seller out of the price of such goods, and without such averments no offense is charged.”

Other cases to the same effect are:

State vs. Lea 41, Tenn. 175, 177; **State vs. Johnson**, 45 S. C., 483, 488; **State vs. Burbage**, 51 S. C. 284; **Watson vs. People**, 134, Ill., 374; **Keech vs. State** 15, Fla., 591; **State vs. Longley**, 10 Ind., 482; **Jones vs. Com.** 86, Va. 950.

No Federal case will be found, we think, antagonistic to the rule of the authorities cited. They are in harmony with the decisions of the Supreme Court and the text writers. In each case we have examined, where a reference has been held sufficient it has been clear, explicit and certain to the exact thing desired to be carried forward. In this case the reference to the description of the scheme and to the representations, is clear and definite as to the particular thing to be incorporated, that is “the said description of the scheme and artifice, so to defraud is hereby made a part of this count.” Nothing else is referred to. The description of the scheme and the representations, pretenses and promises set out in the first count, are found beginning on page 6 of the printed record. There is not in that part of count one, which contains the description and the alleged pretenses, any averment as to the persons to be defrauded, or any averment of an intent to

defraud or any averment of any intent on the part of the defendant to convert any money or property to his own use. These are material matters which cannot be omitted without destroying the indictment. The authorities are clear to the point that an indictment to be valid must set out the names of the persons to be defrauded, or give a good and true reason for not naming them, and that an intent to defraud is essential and must be pleaded, and it is equally clear that under the rule of reference stated in *Blitz vs. U. S.* and *Crain vs. U. S.*, no part of count 1, is incorporated in counts 3, 4 or 5, except that part descriptive of the scheme. Tested by these authorities the demurrer should have been sustained to counts 3, 4 and 5.

United States vs. New South Farm Company, 241, U. S. 64, illustrates the defects in the indictment here. The indictment which is stated at some length in the opinion avers plainly that the defendants were directors and stockholders of the company, and had devised a scheme to defraud certain persons named and others of their money and property, with the intent to convert the same to the use and gain of the defendants and the corporation, by offering to sell to such persons and inducing them to purchase certain 10-acre farms upon certain terms through false representations, etc., which are set out, and that defendants well knew them to be false and intended by them to deceive the persons to be defrauded and to induce such persons to part with their

money and property in the purchase of the farms. The indictment is similar in its scope to the case here and indicates the elements of intent, *indictment*, means of conversion, and the names of the persons to be defrauded in which the indictment here is wanting. The ^{*District*} ~~Supreme~~ Court misapprehended the construction to be placed on Section 215, but they ^{*say*} say they have no intention to control the District Court in its construction of the indictment.

ASSIGNMENTS 4 TO 18, 29, 32. RECORD PAGES 36-41, 58-86.

Coming now to the evidence concerning the Veason project. The company was formed in 1909 for the purpose of marketing the lands of John Veason, comprising approximately 40,000 acres, located in different portions of Oregon. A large number of letters, papers, pamphlets, and documents of various kinds, and also the testimony of a number of witnesses, was received that had no relevancy to the scheme charged in the indictment, and concerning which the indictment papers have relation, viz.: the plan to dispose of the property in Union County. This testimony was objected to and received over exception. The documents so received and read to the jury are numerous, and comprise assignments of error Nos. 4 to 18, as relating to the exhibits and assignment 29 as to the oral testimony of a number of witnesses who gave testimony concerning the character and quality

of certain selected portions of the land included in the Veason contract. Assignment 32 includes several exhibits having relation to these lands.

These several assignments can be grouped, as the same questions relate to their relevancy. The same objection applies that they have relation entirely to the project of John Veason, and have no connection with or relevancy to the enterprise to sell the land in Union County that was planned and developed after the Veason project had been abandoned. The indictment letters all relate to the Union County enterprise, and have no bearing on the Veason scheme, which had died and had been abrogated and abandoned more than three years before the indictment was found. From this great mass of evidence can be selected two samples that will fairly well present the general objection, that it was not admissible to prove the offense charged in the indictment, and concerning which the mails are alleged to have been used. The two copies of the publication "Success" (page 66, exhibit 13, page 73, exhibit 18, Record) and the testimony of the Forest Rangers Donnelly, Ireland, Shelley and others, as to the character and quality of certain of the Veason tracts (Record, page 93, 94). This evidence produced by the government tended to show that in November, 1909, the Oregon Inland Development Company undertook the sale of a large tract of land owned by John Veason. In October, 1910, the sale of these lands was stopped, and everything connected with

them brought to a termination. The literature which related to this Veason property was discontinued, and upon a tract of land in Union County having been contracted for with C. R. Hibberd of La Grande, all contracts that had, to that time been sold, were changed and transferred to the land in Union County. The contract with Veason was abrogated in October, 1910, and from that time everything relating to that scheme was discontinued, and at an end. The outstanding obligations of the company for contracts that it had sold were satisfied by the lands in the new project. It was with relation to this project that the letters were written, and the claim made that they were mailed. The witness Ella O'Gara for the Government testified that in November the company quit selling the Veason lands, and the pamphlet "Fruitdale," which was descriptive of the Union County project was sent out after the change had been made to Union County, and sale of the Veason lands discontinued (p. 77), and that the form letter with defendant's printed signature, exhibit 16, was used until October, 1910 (p. 70); that the bulletin (exhibit 24, p. 75) was mailed to each contract holder during October and November, 1910; that until the change was made to Union County the contract was on a form (exhibit 38) and after the change to Union County the form used was on blue paper, and at a price of \$300.00 (exhibit 39, p. 86). Exhibit 38 related entirely to the Veason matter.

The record books, exhibits 34, 35 and 36, showed by appropriate entries that each contract had been transferred to Union County. J. T. Conway testified (p. 129) that upon executing the second contract with Hibberd October 17, 1910, for 15,000 acres in Union, Baker and Wallowa Counties, all sale of the Veason lands was stopped and all contracts that had been sold transferred to Union County; circulation of "Success" was stopped. At the time the letters mentioned in the several counts in the indictment bear date, the only project on foot by this company was the one in Union County. The Court in his charge to the jury instructed them as follows:

"It also appears in the record undisputed that in the Fall of 1910, they ceased exploiting of the Veason lands and transferred their activities to counties in Eastern Oregon and principally in Union County. It therefore appears that all the transactions had by the company and its officers concerning the Veason lands were more than three years prior to the finding of the indictment in this case * * so that you could not, under any view that you might take of the testimony, find the defendant guilty because of his connection with the corporation during the time that it was exploiting the Veason lands, not only because such transactions are barred by the statute of limitations, but because the indictment does not allege nor charge that during that time the mails of the United States were used in the execution of the alleged fraudulent scheme. The evidence concerning the organiza-

tion of this corporation and its transactions during the time that it was exploiting the Veason lands has been admitted and is to be considered by you, in order that you may ascertain and determine the nature and character of the business in which these people were engaged, and whether or not it was a fraudulent scheme.”

It is not easy to comprehend what principle of law will permit these exhibits and the oral testimony to be admitted in evidence. They were not relevant to the scheme or project for which the defendant was indicted, nor do they have any relation to the letter and documents mentioned in the indictment. They are foreign to the scheme concerning which the letters relate. It is a settled rule, that evidence of collateral acts must never be received as substantive evidence of the offense on trial. **Wharton cr. ev., Sec, 30 (10th Ed.)**; **Boyd vs. U. S., 142 U. S. 450**; **Fish vs. U. S., 215 Fed. 544**; **Marshall vs. U. S., 197 Fed. 511**; **Scheinberg vs. U. S., 213 Fed. 757, 760.**

The offense for which defendant was on trial was for using the mails in the execution of a scheme to defraud in the matter of the Union County lands. The evidence relating to the Veason lands did not operate as proof to show an unsavory character of the Union County property. The indictment letters were not connected in any way with the Veason property and had no relevancy thereto. Long before the time of their dates the Veason project had been abandoned and was entirely terminated, ended and closed, and all acts looking to their advertisement

and sale discontinued. The Company was completely divorced from them and all persons to whom the Company had issued contracts, had entered into new contracts, the old ones having been taken up and superseded. The Veason lands had been repudiated because of their unfitness, and everything connected with them had been concluded. Of this there was neither question nor dispute. The fact was established by the evidence of the Government, so that the relevant query was the character and quality of the property being obtained through the agency of Hibberd in Union County, and the nature of the representations made with reference thereto, and defendants' connection with and knowledge of these lands. To detail before the jury for days the many acts and things done with reference to these Veason lands, to spread before them the extravagant statements made about them by Byrne and Conway in "Success," "Progress" and "The Land of Opportunity," and to put before them the testimony of the ten witnesses that tracts of the Veason land examined by them were all up in the high mountains, arid, rocky and all and every part thereof absolutely worthless and unfit for any agricultural or horticultural use whatsoever, could not have failed to unduly prejudice the jury adversely to the defendant. If this testimony and evidence was admissible for any purpose it was to establish the substantive offense charged in the indictment. It was offered for that express purpose, without any limitation. (State-

ment of Court and District Attorney, page 66 Record, at time of introduction of 1st edition of "Success.") No attempt was made to limit its application, when offered, and its effect on the minds of the jury was made from day to day, as this evidence was produced slowly and in voluminous detail. The partial limitation made in the charge of the Court was neither clear enough, nor sufficiently explicit to inform the jury understandingly as to this extended mass of evidence, which took days to hear. The Court told them that the transactions were barred by the statute of limitations, and that no charge was made of use of the mails concerning them; but the evidence as to these lands was admitted and was to be considered by the jury to enable them to determine "whether or not it was a fraudulent scheme." This was substantive evidence of the direct offense, and not limited to any particular element for which evidence of collateral acts is under some circumstances admissible, but as evidence to prove the actual scheme then in question before the jury. Under the circumstances of this case, it would not have been admissible in any event for any purpose. **Marshall vs. United States**, 197 Fed. 511, 513. The jury were not in any position to eliminate the effect of all this mass of evidence touching the character of the Veason lands, and the representations made by Byrne and Conway concerning them. There was so much of this that did not so explicitly mention Veason, or refer to his name that the jury were left

unadvised as to what part of it did relate to Veason and his project, and what part related to Union County. I mention as an instance, the testimony of the Forest Rangers Donnelly et al. They were each questioned as to the examination, location and quality of certain specifically described sections of land. Veason did not appear in their testimony, nothing in their testimony gave the jury to understand whether they were testifying to Veason lands or lands in the Union County project. So with "Success." The flamboyant utterances which it contained, taken in large part from the publications of the several Chambers of Commerce, throughout the State, had but little in them from which the jurors could tell whether they were intended to refer to the Veason lands or the lands in Union County. Some of the Veason tracts were in Union County and confusion was easy. In fact the Veason tracts that Conway examined and which caused the abandonment of the Veason project and the repudiation of the contract with Veason for the purchase of his lands, were located in Union County and not a great distance from some of the lands owned by the company near Elgin. No admonition was made by the Court at the time of the introduction of this evidence, that its purpose was limited, and it was not until after the jury had listened to this testimony for days, and it had been argued before them by the United States attorney and its full effect and import as evidence of the substantive offense impressed upon

them, and with the full and complete understanding and belief on the part of the jurors, that this evidence was proof of the offense for which defendant was on trial, that the limitation was made by the Court, but in so brief and general a way that it is very doubtful if any of the jurors understood what the limitation meant. Then, too, the documentary evidence was sent to the jury room for the use of the jury when they retired, and they were at liberty to give it as much consideration as they desired. It is extremely doubtful if they thought of these pamphlets and photographs and other papers as being limited in their application, but gave them full consideration, and were unduly influenced by them in reaching their verdict to the substantial prejudice of the defendant.

III.

Assignment 13. (Record Pages 38-70.)

The witness, Ella O'Gara, testified to a circular letter prepared so that all that was necessary was to fill in the address, date and amounts when it would be ready to mail. The signature to this form letter was the stamped signature of Mr. Riddell. She was then asked:

Q. Well, are the signatures true and correct representations of the signature of Mr. Riddell?

A. Just like he writes.

The question was objected to, and a motion made to strike the answer out on the ground that it did not

appear whether defendant had authorized the use of the stamp or other device. The Court overruled the objection and remarked: "I don't think a man can assume the duties of the office of secretary, and allow the literature to go out with his name signed to it without some inference being drawn against him. I don't know just what. It is at least for the jury to pass upon."

An exception was duly saved. It is urged on the Court's attention that the objection to the question and the remarks of the Court were well taken. It was surely proper for the defendant to require that authority for the use of the name be shown. This was not attempted, and nothing to the fact that when the use of this stamp came to the knowledge of defendant he objected to its use and demanded its return (record page 128.) The whole matter depended on the authorization or lack of authority of defendant to the use of his printed signature. It was not a question as to its similarity to his signature, but of his acquiescence in its use. The letter was offered in evidence, over objection and exception (exhibit 16, pages 71, 72 of the record) without any proof having been made that defendant authorized its use. It was offered for the purpose of proving fraud. (Statement of U. S. Att'y, page 71) and to be useful for this purpose the sanction, or acquiescence in its use, or his authority for its use were essential. Without these its admission was error. It was made more prejudicial by show-

ing that letters with the stamped signature of defendant impressed on them were sent through the mails. The jury were looking for evidence of use of the mails, and seeing these printed letters coming before them with proof that they had been transmitted through the mails they were the more readily inclined to belief in the guilt of defendant, notwithstanding that more than three years had elapsed before the indictment was found and the enterprise concerning which the letters were used had been abandoned; and they had no relevancy to the scheme concerning which the indictment letters were written. The jury were influenced adversely to the defendant by the remarks of the Court, which were not impartial, to say the least. Whether designedly or not they created an atmosphere sufficient to impress the jury with the belief that the defendant was guilty because letters bearing his stamped signature were prepared and mailed by Miss O'Gara. The jurors are quick to take impressions from the trial judge, who is easily able to instil into their minds a feeling of hostility to the defendant that evidence will not overcome. **Starr vs. U. S.**, 153 U. S. 626; **Sandals vs. United States**, 213 Fed. 569, 576.

IV.

Assignment 28. (Exhibits 41 and 42.) (Pages 89-90 Record.)

The witness, Fannie Dean, was asked on direct examination by the United States attorney concern-

ing the clearance certificates set out in counts 4 and 5 of the indictment:

Q. Now taking up the first one, No. 557, it is in favor of a Mr. E. H. Bryant of Gallup, New Mexico, and the one 554 is in favor of J. K. Hartline, Albuquerque, New Mexico. Through what agency would that be transmitted to these gentlemen residing in those places?

A. These clearance receipts were first prepared by me and then taken to Mr. Richet and Mr. Riddell for their respective signatures. After Mr. Richet had signed had signed them and after Mr. Riddell had signed them, they would then be mailed by the witness.

The question was objected to and an exception saved.

Counsel was no doubt making an endeavor to prove the mailing of these documents by trying to show a custom; but it was not sufficient to show custom by testimony limited to these two papers alone. We do not see why, if it was a custom of doing business that he was trying to establish in order to reason out a probability of these papers being mailed from a long course of dealing or action with reference to many other papers of this kind, why he did not frame his question so as to include a course of dealing over time sufficient to establish a custom. But this cannot be shown by testimony limited to these two particular papers. The reason why evidence of a custom is allowed is to infer the probab-

ility of an act being done in a particular way from many other acts of a similar kind extending over a long period of time having been done in that way. This testimony was not elicited for that purpose. No course of dealing was proved, and the testimony was not pertinent to the fact of the mailing. It did not establish the facts. The witness afterward testified that these papers were given to Conway after they were signed (record p. 92.) The question through what agency these two specific documents would be transmitted to these gentlemen was not a proper question, nor framed to draw a competent answer.

V.

Assignments 20, 21, 22, 23, 24. Pages 78, 79, 80, 81, 82 record.

The line of evidence including the pamphlet "Fruitdale," exhibit 28, "Famous Fruits," exhibit 29," "Coming to Oregon," exhibit 30, "Grande Ronde District in Oregon," exhibit 31. The large poster, exhibit 32, went to the jury over the objection and exception of defendant.

These pamphlets and booklets, were issued by the Oregon Inland Development Company in advertising the Union County lands. The objection to them is based on the fact that it was not proved that the defendant knew that any of the statements and representations made in them were false, and for the reason that it was not shown that defendant

prepared or assisted in preparing any of this literature. This literature was prepared by Conway.

The witness, Ella O'Gara, testified as to the knowledge of defendant of part of this literature, and as to his having seen several of the different pamphlets, no one, however, went so far as to testify to defendant's knowledge of the contents of any of it, or that defendant had any knowledge of any untrue statements or misrepresentations of fact that might have been inserted in these booklets. No one testified that defendant did anything in the way of preparing material for these pamphlets, or that he obtained the photographs for the poster or knew them to be misleading or untrue. The most that was testified to connect defendant with it was the statement of Ella O'Gara, who said (p. 82):

"Mr. Riddell knew we were getting out the big poster and he saw it on the wall and he saw it after it was published, and he was very enthusiastic about it. He said this poster ought to get the business if anything would."

This falls considerably short of fixing defendant's responsibility for the publication. It does not tend to indicate a knowledge of any misrepresentation on the part of defendant. It does not show any knowledge by him that the pictures on the poster were untrue, and did not conform to the labels. It all failed to indicate a guilty knowledge necessary to implicate him for the publication of any of this literature.

Here is where the prosecution is weak. They failed all through the case to show that defendant had any knowledge of the lands advertised as would render him morally culpable for any misstatements that may appear in any of these publications. It is this knowledge that will make him responsible; without it there is no evidence of bad faith, which is essential to the government's case, simply knowledge that the publications were issued and used for advertising purposes is not enough to permit their admission in evidence. There must be evidence that defendant knew the lands, or knew the untruth of the literature, something that would directly connect him with the fraud and show a fraudulent intent in him. The government's case must rest on evidence more potent than a mere possibility. There must be positive proof.

In particular so far as exhibit 29 the pamphlet entitled "Famous Fruits" is concerned, the evidence was to the effect that this publication was prepared by Conway, and not submitted to defendant (p. 78 record). This paper was received in evidence without proof of knowledge of it by defendant, much less knowledge of any untruth as to the statements which it contained. The government's evidence showed that defendant was not responsible for this publication. The effect of this book on the jury was heightened by the Court's remarks that, "It was gotten out by the general manager of the firm, a man employed by or whom Mr. Riddle assisted in employing ac-

ording to the contract, and if in the proper scope of the employment I suppose some responsibility attaches to the employer and I think is competent." (p. 79.)

The contract referred to (exhibit 27) was a contract between the company and Conway, providing for the duties and compensation of Conway. It was signed on behalf of the corporation by the president, F. Richet, and attested by defendant as secretary. It was not defendant's personal act, nor did it result from any agreement made by defendant. Conway and Richet owned the stock, and managed the business. It was an agreement reached between them; the agreement was attested by defendant in his capacity as secretary. It was certainly incorrect, prejudicial to defendant and out of accord with established principles of law for the Court to admit this paper which was admittedly not known to defendant, and to heighten and increase its prejudicial effect on the jury by the remarks which gave them to understand that defendant was Conway's employer that Conway was merely an employe, and that defendant was criminally responsible for the delicts of Conway. This was all untrue and without basis of fact or law to support it.

Any eulogistic matter as to the property mentioned that may have been untrue or of such nature as to unduly impress the jury must have had a prejudicial effect. This publication was not competent tested by any rule that requires knowledge of its

publication on the part of defendant. It was incompetent tested by any rule that requires knowledge of the falsity of its statements to be shown by the prosecution. No rule of evidence of which we are advised will sanction its admission.

While the government was offering evidence relating to the publication entitled "Famous Fruits," prepared and used by Conway, the Court remarked in the hearing of the jury, "It (meaning the publication) was gotten out by the general manager of the firm, a man **employed by or whom Mr. Riddell assisted in employing**, according to the contract, (complainant's exhibit 27) and if in the proper scope of the employment I suppose **some responsibility attaches to the employer** and I think is competent. But the evidence in this case up to this time indicates that this concern was organized for a purpose the government claims is fraudulent, and that was the object and purpose they had in view. Mr. Riddell was one of the organizers, director and secretary of the concern signed the contract to put a man in charge to carry out the purposes of the organization, and if it was such as the government claims and I don't think a man can do that and then escape responsibility, even criminal, if the evidence sustains that theory. That is a question for the jury of course." (Record p. 79.)

It is not true that when one who as secretary of a corporation signs a document that it is his personal act. The defendant did not employ Conway. The

act of signing the contract as secretary was a ministerial act in which he had no personal interest. It was necessary to become a valid contract of the corporation, that it should be attested by the signature of the secretary. It was signed because it was an agreement that had been made by Conway and Richet as the ones interested in the business, and to evidence a formal contract between Conway and the company. It was misleading to the jury to tell them that the act of defendant appending his signature to the contract as secretary, made Conway an employe of defendant, and to say that Conway was a man employed by defendant, and if in the proper scope of the employment some responsibility attaches to the employer * * * “and I don’t think a man can do that and then escape responsibility even criminal.”

The contracts of a corporation are generally signed with the corporate name, by the president or some general officer other than the secretary. The secretary has very limited powers. His duties are clerical; he has no general power to make contracts. He is limited to the duty of affixing the seal and attesting it by his signature. The corporation acts through its president or other head and through him executes its agreements. The secretary stands in the light of an attesting witness. **Williams vs. Harris, 198 Ill. 501; 64 N. E. 988.**

It was error and prejudicial for the Court to impress the jury with the belief that defendant was

the employer of Conway, and criminally responsible for all of Conway's acts. The jury carried this wrong belief with them throughout the trial, and into the jury room. The influence of the trial judge on the jury is at all times of great weight. His lightest word or intimation is received as a direction and is generally controlling. Remarks that state an erroneous rule of law, or which tend to create a feeling against the accused have the tendency to prevent a fair trial, and are improper.

Starr vs. U. S. 153, U. S. 626; Hicks vs. U. S. 150, U. S. 452; Sandals vs. U. S. 213, Fed. 569, 576; Rudd vs. United States 173, Fed. 912, 914; Lemon vs. United States 164, Fed. 961; Hickory vs. United States 160, U. S. 424; Smith vs. United States 161, U. S. 89, 90; Mullen vs. United States 106, Fed. 892-896.

VI.

Assignments 33, 34 and 35, Record pages 42,, 109-115.

Objection was made to the admission in evidence of the letter set out in count 3 and the certificates in counts 4 and 5, and to the instruction of the Court that it was not necessary that the letter be of a nature to be effective in carrying out the scheme, but that it was enough if the papers were designed for the purpose of executing the scheme or to assist in carrying it into effect, although in the opinion of the jury they might have been wholly insufficient for that purpose and that the letters or documents

were intended by the parties mailing them in execution of the scheme. (Record pages 43, 159.)

The letter set out in count 3 was not proved to have been connected with the defendant, and was not relevant to the scheme described in the indictment, and was consequently not admissible. Keeping in view the allegations of the indictment as to the so-called auction contracts, and the fact that the scheme outlined in the indictment as developed included those who held contracts for one of the tracts and a lot at Klamath Falls, and the statutory requirement that the mailing denounced is of a letter mailed for the purpose of executing the scheme, it must be, in the absence of direct evidence of intent by defendant, that unless the letter on its face showed that it could have been instrumental in executing the scheme set out that it would not be admissible.

The letter in count 3 does not relate to the consummation of the plan set out in count 1. Its plain terms indicate the contrary. An inspection will show that it is a proposal for the sale of a specified ten-acre tract, and an offer to the addressee to exchange his contract for a specified piece of acreage. The letter mentions the enclosure of plats of 32 ten-acre tracts. This was merely an offer to trade him a piece of land for his contract, and let him inspect the land before he made the exchange.

The letter must be adapted to the execution of the scheme set out in the indictment and have such

relation thereto as will give it some applicability to the scheme. The scheme or artifice in the execution of which this letter was claimed to have been mailed, must have been something which could have been furthered by the sending of the letter. **Hendrey vs. United States** 233 Fed. 9, 11; **Stewart vs. U. S.** 119 Fed. 95; **U. S. vs. Kenofskey** 235, Fed. 1019. The addressee of the letter testified as to its receipt, and that he did not elect to transfer his contract to a particular piece of acreage, although according to the terms of the letter he had an opportunity to do so. The letter shows on its face that it could not have been in execution of the scheme, it was merely a proposition to exchange the contract for something else not set out or included in the terms of the indictment. The very broad rule stated in **Durland vs. United States** 161, U. S. 315 that it is enough if, having devised a scheme to defraud the defendant, with a view of executing it, deposits in the post-office letters which **he thinks** may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor, must in all reason be limited to letters having some relation to the scheme planned and described in the indictment. The letter must be capable of being effective, particularly in the absence of any mailing by defendant, or any knowledge by him of the writing of the letter, or of its existence, or of any intention on his part to execute the scheme described. In the absence of any thought on the part of defendant as

to the purpose of the letter, it should be such an one as is reasonably adapted to aid in executing the scheme outlined in the indictment. We think that so far as this letter is concerned, it is entirely inapplicable to the scheme described in the indictment, and was not such as could be effective in carrying the alleged scheme into execution.

In the Durland case the Supreme Court put a limit on letters that may be admitted to support an indictment. It must be a letter which the **defendant thinks** may assist in carrying the scheme into effect. It is not every letter that will suffice to support a charge. There is no evidence that the defendant had any thought, or design of any kind as to this letter. He could not, as he was ignorant of it. No construction that the letter will bear can bring it within the scope of the indictment, so as to make it in any way effective in carrying the scheme or plan there set out into execution. The rule in the Durland case requires knowledge on the part of the defendant of the mailing, otherwise he could not come within it by thinking that the letter will serve to aid in the execution of the plan.

Then, too, there is no evidence that the defendant caused it to be mailed. Its existence was unknown to him. He was ignorant that it was mailed. There is no evidence that he planned or set in motion any forces that led to the mailing of this letter, nothing to show that he approved of it, no conscious participation in its deposit in the postoffice.

The verb **cause** means to produce, to compel. It is that which produces a result; that from which anything proceeds, and without which it would not exist, **State vs. Dougherty, 4 Ore. 203; Ins. Co. vs. Pacific Union Club 169 Fed. 776.** To cause is to turn the balance; to bring about that condition which determines the final result. It calls for an act of the will, a conscious act. In legal contemplation a letter was caused to be mailed by one, if by his **authorization**, or with his **knowledge** and **acquiescence**, it was done by B in the execution of their joint enterprise. **Burton vs. United States 142 Fed. 62.** An act cannot therefore be said to be caused by one, unless he brought it about, unless he authorized it, or unless it was done by another at his direction, or in the execution of their joint enterprise with his knowledge and acquiescence. These definitions and their practical application all call for knowledge, at least the exercise of some conscious act looking to the mailing and an acquiescence in the deposit in the postoffice. In **Samuels vs. United States 232 Fed. 540, 541,** the Court say:

“In order to constitute the offense charged the defendant must have either deposited these letters in the postoffice to be carried through the mails to the parties to whom they were addressed, or caused it to be done, **knowing** that they were for the purpose of carrying into effect the scheme to defraud charged in the indictment.”

The same objection as to insufficient proof of mailing by defendant applies to the clearance certi-

ificates set out in counts 4 and 5. There is not even a scintilla of evidence as to any mailing by defendant or of any act of his being a cause for their being placed in the mails. They were admitted under the theory that defendant was responsible for the acts of Conway and Richet, and that if either of these caused them to be mailed defendant was chargeable. This, we think is not the law. There must be some conscious act of the defendant which propelled them toward the mails. There is an absence of any testimony to show this. The only evidence is that of the addressees, who testified to their receipt by mail. Mrs. Dean testified that the receipts were signed by defendant at her request and given by her to Conway. She was not certain whether the letter in count 3 was mailed to Hayward (p. 92, record). The clearance receipts were taken by Conway to the office of the Northern Trust Company for registration and left there. Riddell did not know what disposition was made of them. The Hayward letter was not shown to defendant who did not know that it was mailed (Record p. 130). This is all the evidence as to the mailing. All the testimony on this point has been preserved (record page 147). It will be seen that there is no evidence to connect defendant with the mailing of either of these documents, nothing to show his knowledge of their existence, nothing to establish him as a cause for their having been mailed, nothing to bring the mailing within the purview of the principle of proximate cause as used in

Demolli vs. United States, and their admission in evidence was error.

The exhibit 119, is further objectionable as not being either the original or a proved copy. In the absence of the original before secondary evidence of its contents is admissible a copy must be proved. Hayward simply stated that he could not say what he did with the original letter, because he could not find it in his office when he left, and they had a fire in the building where his office was located and a number of his papers were lost. But he states he forwarded the letter to the United States attorney at Portland. So it was not burned. The original should have been produced, an unproved copy was not admissible.

VII.

Assignments of Error 45, 46, 47; Record pages 46, 174.

The indictment charges that the defendant did place and **cause to be placed** in the postoffice for mailing and delivery, a letter, etc. (pp. 16, 19, 21 Record.)

All the evidence as to the mailing of the indictment papers has been incorporated in the bill of exceptions (record p. 147), by the evidence of the government it appears undisputed that the defendant did not mail either of the three documents, or direct their mailing. There is no direct evidence of mailing. The whole proof on this score is reduced to an inference, from the fact that the

respective addressees received the several documents from the postoffice. So that if defendant is to be held, it must be because of some implication of law that makes him criminally responsible for the acts of others performed without his knowledge or acquiescence, and an implication that he thereby caused the three documents to be mailed. The indictment must stand, if at all, on the allegation that he caused the letters to be mailed, no mailing by defendant having been proved.

The rule as to a sufficient allegation in an indictment of causing an inhibited act to be done is stated in **Simmons vs. United States 96 U. S. 360, 362**, and is that a charge that defendant caused a thing to be done must give the name of the person whom he caused to perform the act, or if such person's name was unknown to the grand jury it should have been so stated. The principle of law applied in this case is applicable here. There the indictment was for a violation of section 3266 R. S., which makes it punishable for any one to cause certain prohibited acts to be done. The indictment charged that the defendant "did knowingly and unlawfully cause and procure to be used a still," etc. The Supreme Court, after stating the rules of law for determining the sufficiency of indictments say, page 362:

"Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler and other vessels himself, but only with causing and pro-

curing some one else to use them, the name of that person should have been given. It was neither impracticable, nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment.”

The charge that the defendant himself did the mailing is perhaps sufficiently direct to hold if there was any evidence on which such charge could be substantiated. There being no evidence even tending to show any mailing by defendant, nor personal knowledge on his part of such mailing, nor anything from which an inference of mailing by him can be drawn, there is a variance between the pleading and proof. The verdict must stand on the charge that he caused the letters to be mailed, and under the rule stated by the Supreme Court in the *Simmons* case the indictment is fatally defective in that respect. This entitled the defendant at least to the instructions to acquit (Assignments 45, 46 and 47, pp. 46, 174 of the record.) The rule as stated above has never been departed from. It was applied in **United States vs. Hess 124 U. S. 483, 488** as governing an indictment for using the mails in aid of a scheme to defraud, and it has since been followed and applied, as a settled rule of procedure, by the Federal Courts in cases under Secs. 5480 R. S. and 215 of the Penal Code.

These requests should have been given for yet another reason. The evidence of the government

(pages 91, 92, 93 record) is to the effect that defendant did not take any part in the management or operation of the company's business, that defendant worked for the company on a salary and was not consulted about the office business; that the entire management of the business of the company was directed by Conway; that Conway, Richet, Hibberd, the agents and everybody who had knowledge of these lands were loud in their praise; that defendant received this information. Defendant did not have access to the books or papers of the company. No orders were given by defendant. He knew nothing about the records or books of the company and did not have the combination to the safe, or a key to the office of the company; all the books were kept in the safe. When Conway was out of town Mrs. Dean was in charge of the office. Defendant signed the clearance receipts as secretary when they were presented to him, and sometimes he signed them in blank. Defendant had nothing to do with the correspondence. The government in putting forth this testimony established the non-participation of defendant, in the transaction of the business of the corporation. A party is not allowed to deny the credibility of its witness. This evidence of defendant's not having any part in the direction of the business, and his belief that the lands being sold were good lands frees him from complicity in the scheme, and explains away all that might be inferred from the fact that he was secretary and signed the

checks, clearance receipts and other papers that required the secretary's signature.

VIII.

Assignments 43, 44. Pages 161, 162 record.

The Court in charging the jury instructed them as to the element of intent to defraud in the following language. (Record pp. 161, 162.):

The law presumes that every man intends the natural and probable consequences of his own unlawful acts. Wrongful or unlawful acts when knowingly or intentionally committed cannot be justified nor excused on the ground of innocent intent. An intent to injure or defraud is presumed when an unlawful act which results in loss or injury is proved to have been knowingly committed. If, therefore, you find from the evidence and beyond a reasonable doubt that there was a scheme and artifice to defraud substantially as set out in the indictment, and that the defendant Riddell was a party thereto, that the representations contained in the literature of the company were made with his knowledge, and that these representations were known by him to be false, then the intent to injure and to defraud the auction contract holders of the Oregon Inland Development Company may be by you presumed. Acts which involve such consequences when knowingly and wrongfully committed **establish** not only a guilty intent to injure and defraud **but they disclose moral turpitude utterly inconsistent with an innocent in-**

tent. It is presumed that every sane person intends the natural and ordinary consequences of his own voluntary act. Applying this rule to the case at bar, if you should find from the evidence and beyond a reasonable doubt that the defendant was a party to the scheme and artifice to defraud set out in the indictment, if you should find that there was such a scheme or artifice, and that in the execution of such scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in count 3 of the indictment, and the circulars set out in counts 4 and 5 of the indictment, then he would have violated the statute and your verdict should be accordingly.

The instructions quoted were error, because they eliminated the question of intent from the consideration of the jury, and told them that if they found the defendant was a party to the scheme and artifice set out in the indictment and caused the mailing of the indictment letters he should be convicted regardless of whether or not he intended to do anything to injure or defraud any one. The instruction had the effect of making the presumption of intent a conclusive one, and forbade the jury making any finding on this essential element of the case.

The instruction went much further than to shift the burden of proof from the government to the defendant. It settled the question of intent conclusively as against the defendant, if it should be found that he was a party to the scheme. He may have

been a party to the scheme, believing in the good faith of those who were managing and controlling the affairs of the company, and in the good quality of the lands that were being disposed of. His belief in the integrity of the scheme may have been absolute, and yet the jury were not permitted to consider his good faith or honest belief, if they simply found that he was a party to the scheme set out in the indictment.

The intent to defraud is a material ingredient of the offense denounced in section 215 of the Penal Code. It is a fact to be submitted to and found by the jury. "The significant fact is the **intent and purpose.**" **Durland vs. U. S., 161 U. S. 313.** "There must be the underlying **intent** to defraud." **Harri-son vs. U.S., 200 Fed. 665.** "The **intention** of the defendant to defraud is an essential element of the offense." **Miller vs. U. S. 133, Fed. 342.** The defendant was entitled to have the issue as to his good faith submitted to the jury to the same extent as the other material elements of the offense with which he was charged. The burden was upon the government to prove the intent of the defendant to defraud beyond a reasonable doubt. This was a matter of proof to be submitted to the jury for their determination, and not a presumption of law to be conclusively settled by the Court, and the jury instructed that it was altogether matter of law, and not a question that required consideration by them.

In Coffin vs. United States 156 U. S. 432, 445 the Trial Court charged the jury, p. 445:

That when the prohibited acts are knowingly and intentionally done, and their natural and legitimate consequence are to produce injury to the bank, or to benefit the wrongdoer, the intent to injure, deceive, or defraud is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful and their acts legitimate.”

The Supreme Court held this instruction error, saying, p. 461:

“In addition, we think the 22d exception to the rulings of the Court well taken. The error contained in the charge, which said substantially that the burden of proof had shifted under the circumstances of the case, and that therefore it was incumbent on the accused to show the lawfulness of their acts was not merely verbal, but was fundamental.”

In Hibbard vs. United States 172 Fed. 66, 71, the indictment was for using the mails in the execution of a scheme to defraud. The trial judge charged the jury as follows:

“The law presumes that every man intends the natural, legitimate and necessary consequence of his acts. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud may be presumed upon an unlawful act which results in loss or injury, if proved to have been knowingly committed.”

The Court told the jury in this instruction that the intent to defraud was established, conclusively presumed, when he said: "Acts which involve such consequences when knowingly and wrongfully committed **establish**, not only a guilty intent to injure and defraud, but they disclose moral turpitude utterly inconsistent with an innocent intent." This is much more than a disputable presumption; it is a conclusive determination. To establish is to fix unalterably; to settle firmly and permanently what was before uncertain; **Century Dict., Webster; 11 Am. and Eng. Enc. Law, 2d ed. 353; Eberhardt vs. Sanger 51 Wis. 78; Eagan vs. Finney 42, Ore. 599; Smith vs. Forrest 49, N. H. 230.** Thus to establish a guilty intent is to fix it unalterably, to settle it firmly and permanently. The Court took it upon himself to find that element of fact, and to instruct the jury that the presumption of intent that would arise would be conclusive and beyond discussion. It made no difference what evidence of good faith and innocent intent might have appeared in the course of the trial, it all went to no purpose in the face of this strange and startling instruction. Cases of this nature involving a violation of this law, have without exception been reversed whenever an instruction making the presumption of guilty intent conclusive was given. Indeed whenever an instruction in a criminal case which had the effect to shift the burden of proof to the defendant as to any element was given, the Appellate Courts have without exception reversed the judgments.

The Court of Appeals, speaking through Circuit Judge Seaman, after citing the general rule of presumption stated in *Greenleaf*, that a sane man is presumed to contemplate the natural and probable consequences of his own acts proceeds to say:

“Of course no such rule is applicable to the case at bar; and it appears from other instructions submitting the issue of intent to determination by the jury from all the evidence, that the Court intended no such conclusive effect to be understood from the above mentioned instruction. Nevertheless, the unqualified terms so stated as a presumption of law, are erroneous and their liability to mislead the jury is undoubted, irrespective of the contention on behalf of the plaintiff in error that no presumption of specific intent to defraud—which is the statutory offense charged in the indictment—arises from the fact that the fraud may appear to be the natural consequence of the act committed. The distinction between presumptions of law and mere inferences of fact is not observed in this instruction; and assuming it to be a disputable presumption of law (1 *Greenleaf Ev.* 33) its effect must be to cast the burden upon the accused to disprove fraudulent intent, which is unauthorized. * * * The intent may rightly be inferred from the circumstances in evidence, but it is an inference of fact, not a presumption of law.”

In the case of **McKnight vs. United States** 115 **Fed 972** the trial judge gave the jury the following instruction:

“The presumption is that a person intends the natural and probable consequence of his acts intentionally done, and that an unlawful act implies an unlawful intent. The law presumes that every person intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed.”

Judge, now Justice Day, in commenting on this instruction, said:

“This method of making proof of intent to defraud, as necessarily flowing from acts whose legitimate tendency is to defraud does not absolve the prosecution from the requirement of showing intent, when that it is an essential element of the crime, by the rule of evidence which requires proof in criminal cases to be sufficiently certain as to exclude reasonable doubt of guilt. If the burden of proof shifted to the defendant when the prosecution has introduced testimony from which the jury, in the absence of other proof, may infer the presence of guilty purpose or intent—especially if the defendant was required to establish this want of intent beyond a reasonable doubt—the accused may be convicted when the proof leaves in the minds of the jurors a reasonable doubt of his guilt as to an essential element of the crime * * * the burden of proving evil intent, where an essential ele-

ment of the crime, is with the prosecution, and does not shift to the accused. * * * The intent to defraud was a vital element of the case to be made out by the United States."

In **Chaffee vs. United States** 18 Wall 516, 545, the Court instructed the jury that it was a rule, without exception, that where a party has proof in his power which if produced, would render material facts certain, the law presumes against him if he omits to produce it. The Supreme Court say:

"The purport of this was to tell the jury that although the defendant must be proved guilty beyond a reasonable doubt, yet if the government had made out a prima facie case against them, not one free from all doubt, but one which disclosed circumstance requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of law that full proof which which should dispel all reasonable doubt. In other words the Court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. * * * * The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury and converted what at law was intended for their protection—the right to refuse to testi-

fy—into the machinery for their sure destruction.”

In **Cummins vs. United States 232 Fed 844** the trial judge charged the jury in the following language:

“The law presumes that every person intends to do that which is the natural result of his actions. * * * Every person under the law is held responsible for what, as a reasonable man he must have known would be the result of his act.”

The Court say:

“In a case like this in which a specific intent accompanying the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. * * * Of course a jury in the absence of other evidence would be authorized to infer the intent from the character and natural consequence of the act; but even then the ultimate finding is for the jury, not the Court. * * * If the Court might properly have instructed the jury that the evidence was legally conclusive against him, it could as well have directed a verdict of guilty in so many words.”

“A defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty.” **Konda vs. United States 166 Fed. 93.**

In **Melton vs. United States** 120 Fed. 504, the Court charged the jury that if they found certain facts as to the indictment letter having been written at Gadsden, Ala., by one of the defendants, and having relation to the scheme to defraud, and that it was found on the desk of the defendant Clark, they might presume that the letter was placed, or caused to be placed in the postoffice by defendants, or one of them, unless there be other circumstances or evidence which removes such presumption. This was held error, that the charge tended to deprive defendants of the presumption of innocence. The Court say:

“The important inquiry was whether or not the defendants posted the letters at Gadsden. From proof of certain facts the Court said the jury were authorized to find that they did so post them unless there was other evidence favorable to defendants which removes such presumption. This is in effect, to instruct the jury that the proof of certain facts showed defendants guilty of the act in question, and shifted the burden of proof to the defendants to remove the presumption,” and was error.

In **Chambliss vs. United States**, 218 Fed. 157, the jury were instructed that where liquor illegally introduced into the Indian Country was found in the possession of the defendant, the jury would be warranted in returning a verdict of guilty, unless there was some explanation which the jury finds consistent with his innocence. This was held error as shifting the burden to the defendant.

“The burden of proof is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. **Davis vs. U. S., 160 U. S. 487.**

In **People vs. Baker, 96 N. Y. 340, 350**, the trial judge charged in the following language:

“If you find that the defendant made the representations charged in the indictment, and that they were false, and the defendant knew they were false when he made them, then the law presumes the fraudulent intent.”

The Court of Appeals in holding the instruction error said:

“The crime of false pretenses is not made out by simply showing that the representations charged in the indictment were made, and that they were false, and that the defendant knew them to be false. The jury from those facts and from all the other facts may infer a fraudulent intent; but the law does not presume a fraudulent intent; that is to be found as a fact by the jury, and is not an inference of law.”

Post vs. U. S. 135 Fed. 1, 10; Potter vs. U. S. 155, U. S. 438; Black vs. State 18 Tex. App. 124, 129; Lura vs. State 12 Tex. App. 257, 259; State vs. Maynard 9 Pac. 514 Nev.; State vs. Luff 74 Atl. 1079; German vs. U. S. 120 Fed. 666 (C. C. A.); Hicks vs. U.

S. 150 U. S. 449; *People vs. Flack* 123 N. Y. 324; *Stokes vs. People* 53 N. Y. 164, 179; *People vs. Martin* 33 App. Div 284; *State vs. Hatcher* 29, Ore. 309, 320.

In each of the several cases cited, the erroneous instruction was far less conclusive and binding on the jury than the charge complained of here. The jury are given far greater latitude when told, as in *Coffin vs. U. S.* that the intent to defraud is sufficiently established to cast on the defendant the burden of showing that their purpose was lawful and their acts legitimate, than in the case at bar where told that such acts **establish** not only a guilty intent to injure and defraud, but they disclose moral turpitude utterly inconsistent with an innocent intent. In the one case the acts knowingly and intentionally done sufficiently established the intent to cast the burden of disproving them on the defendant; while here the instruction established the intent, that is fixed it unalterably, and made the presumption conclusive. The Court, not content with instructing the jury that the presumption of a guilty intent was conclusive, emphatically impressed on the minds of the jurors the final nature of the presumption by adding "but they disclose moral turpitude utterly inconsistent with an innocent intent." The plain import of this language is obvious, and goes to an extent not hinted at in any of the cases cited. The Court in the instruction went on to charge the jury that:

“It is presumed that every sane person intends the natural and ordinary consequence of his own voluntary act. Applying this rule to the case at bar, if you should find from the evidence, and beyond a reasonable doubt, that the defendant was a party to the scheme and artifice to defraud set out in the indictment, if you should find that there was such a scheme or artifice, and that in the execution of said scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in count 3 of the indictment, and the circulars set out in counts 4 and 5 of the indictment, then he would have violated the statute and your verdict should be accordingly.”

This quotation is the last paragraph of the instruction as to intent and directly follows the conclusive instruction given above. The rule of presumptions stated in the beginning of this last quoted part of the instruction follows the rule as to evidence stated by Greenleaf. This rule has been held inapplicable to an instruction in cases under this statute. **Hibbard vs. United States 172 Fed. 66, 71;** where it is said: “Of course no such rule is applicable.”

This instruction that the Court gave as to the presumption of intent, indicates instantly the conclusive nature of the charge, and required the jury to return a verdict of guilty if they should find that the defendant was a party to the scheme or artifice set out in the indictment, and that he mailed or

caused one of the indictment letters to be mailed, thus eliminating entirely from the consideration of the jury the vital element of intent, which all the books and authorities rule must be submitted to the jury as a vital and substantial part of the case and which the jury are required to find beyond a reasonable doubt.

IX.

Assignments 39, 49, 50, 51, pages 43, 159, 186 Record.

Defendant saved an exception to the following instruction given to the jury:

“It is enough if, having devised a scheme to defraud, the defendant with a view to executing it, deposited or caused to be deposited in the postoffice, letters or papers which were designed for the purpose of carrying it into effect, although in the judgment of the jury they may be wholly insufficient for that purpose; nor is it necessary for the government to prove the mailing of all of the letters set out in the indictment and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was mailed by the defendant or caused to be mailed by him, and that such letter or document was in fact intended by the parties mailing it in the execution of or to assist in the execution of the alleged unlawful scheme.”

This instruction is objectionable in that by it the Court told the jury that they might convict if they should find that the defendant caused the mailing

of but one of the indictment letters. Each count in the indictment is a separate charge. It is a separate indictment, and must stand or fall on its own proof. Each letter deposited is a separate offense **In Re Henry 123 U. S. 373**. The charge was in three counts. To warrant a verdict of guilty on any one of these counts the jury must necessarily find that the specific letter or document set out in such count was in fact mailed by defendant, or through his instrumentality. He could not be convicted of the charge in count 3, because he caused the mailing of the paper described in count 4, nor could he be justly convicted under counts 4 and 5 on proof of the mailing of the letter in count 3. It seems too clear to require more than the bare statement, that defendant could not be convicted of the offense charged in any one count on proof of mailing anything other than the letter or paper charged in such count. This instruction, however, gave the jury to understand that defendant could be convicted on all three counts on proof being made that he mailed any one of the three documents charged. This is not in conformity with the law.

In a subsequent part of the charge (p. 160) this instruction was repeated, and it is found again in the instruction forming assignment of error 40. The direction that all that was necessary was a finding as to the mailing of one letter to authorize a conviction, on all three counts is repeated on pages 133, 155 and 166. Nowhere in the instructions to the

jury is there any explanation that each count is a separate charge of a distinct offense, or that each count is a separate indictment, or that the defendant could not be convicted of the charge in one count by proof of the mailing of the letter described in another count. By this instruction the door was opened wide for the jury to pronounce a verdict of guilty on all three counts on proof of the mailing of any one of the documents set out.

Defendant requested the Court to expressly instruct the jury as to each separate count, and that the mailing of any one of such documents should be limited to the count which charged its mailing. These requests which the Court denied are as follows, (pages 179, 180.):

“The jury is instructed that the defendant cannot be found guilty under the third count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain letter of date June 26th, 1911, signed Oregon Inland Development Company, J. T. Conway, Vice-President and General Manager, addressed to W. C. Hayward, Manila, Iowa, which letter is set forth in the third count of the indictment.”

“The jury is instructed that the defendant cannot be found guilty under the fourth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate dated June 9th, 1911, in favor of E. H. Bryant of Gallup, New Mexico, which

certificate is set forth in the fourth count of the indictment.”

“The jury is instructed that the defendant cannot be found guilty under the fifth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate of date May 29th, 1911, in favor of J. K. Hartline of Albuquerque, New Mexico, which certificate is set forth in the fifth count of the indictment.”

These requests were refused, nor was their substance covered in any part of the general charge; but instead, the misleading and erroneous instruction was given that it was only necessary to find the mailing of but one of the indictment papers to warrant a verdict of guilty, without any explanation as to the effect of the several counts, or what a count included, and required.

These requests should have been given, and the jury instructed that a finding as to the mailing of any one of the three documents would not justify a verdict of guilty on any count other than the one charging that specific paper. The Court failed to state that each count was a distinct charge of the commission of a substantive offense, complete in itself, and was not to be confounded with either of the other counts. Each count must be substantiated by its own proof and considered and passed on separately. It is not in accord with the principles of law to blend three accusations together so that the jury can find an accused guilty of three separate

crimes if they have evidence of the commission of one only. It can lead to three convictions and three punishments for one infraction of the law and is not to be tolerated.

This instruction departs from the broad rule of **Durland vs. U. S.** as to the letters mailed being for the purpose of executing the scheme set out. That rule limited the letters to such as the **defendant thinks** may assist in carrying the scheme into effect. This instruction enlarged appreciably on that rule, by saying “letters or papers which **were designed**” for that purpose; and again it is stated, “It is sufficient * * * that such letter or document was in fact intended **by the parties mailing it** in the execution of” the scheme. The instruction does not say that the defendant must have thought each document would assist to execute the scheme, nor that defendant intended or purposed them to be in execution thereof, but enlarged the rule to place the design that such letter should be for that purpose to some one else than the defendant, and that the intent might be that of the **parties** mailing the letter, and not of the defendant.

X.

Assignments 33, 40. Record pages 42, 44, 158, 160, 185. 187.

The Court in charging the jury said, (p. 158):

“If, therefore, you believe from the testimony in this case that there was an unlawful

and illegal device or scheme to defraud by means of false and fraudulent representations set out in the indictment, entered into between the defendant and Conway and Richet, or either of them, and that such scheme contemplated the use of the United States mails in its accomplishment, then it can make no difference, as far as the defendant's guilt is concerned, which one of the co-conspirators mailed the letters charged in the indictment, if they were mailed at all, or whether he knew that they were mailed, or whether he had any knowledge of the contents thereof, if in fact they were mailed by one of the conspirators, or associates in furtherance of the unlawful scheme or device to defraud to which the defendant Riddell was a party, and of which he had knowledge. * * * * *

You must, therefore, before you can find the defendant guilty be satisfied beyond a reasonable doubt, as I shall attempt to define that term to you hereafter, that he devised or assisted in devising such scheme to defraud, and that he or **his co-conspirators placed or or caused to be placed** in the postoffice of the United States for mailing and delivery, one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention, for the purpose of executing such scheme."

It is submitted that the Court erred in giving these instructions to the jury. By them the jury were told that the defendant was responsible for any act of either Conway or Richet; and also that if Conway and Richet had devised the scheme, it could

make no difference so far as the defendant's guilt was concerned, which one mailed the letters, or whether defendant knew they were mailed, or had any knowledge of the contents thereof, and further that he should be convicted if one of the co-conspirators caused the letters to be mailed.

Under Section 215 Cr. Code, the offense consists in mailing the letter. If the letter is not mailed there can be no crime.

A conspiracy to be criminal must be to commit an offense against the laws of the United States. The conspiracy must be to mail the letter in the execution of a scheme to defraud. **Salla vs. U. S. 104 Fed. 544; U. S. vs. Clark 121 Fed. 190, 191.**

Defendant cannot be held responsible for the act of either Conway or Richet unknown to him, in the absence of a conspiracy to mail the letter adverted to. Can defendant be convicted for a conspiracy without being indicted for conspiring? If it be claimed that there was a conspiracy in devising the scheme set out in the indictment, can it be said that the conspiracy went to the mailing of the letters set out? There is no such averment. It is charged that defendant with his associates devised the scheme, but that the defendant alone caused the letters to be mailed.

The Court charged that it was sufficient to convict if Richet or Conway caused the letters to be mailed. It is very remote from the statute to say

that the accused is chargeable because some one else caused the letters to be mailed, when the law demands that the defendant himself must have caused the mailing. He and no one else must have been the active moving cause. Nothing more remote can possibly satisfy the law. It cannot be sufficient to base a conviction on a mailing caused by Conway or Richet and not by defendant. Will it do to say that defendant must answer for what Conway or Richet caused to be done; or that he is responsible for the act of either Conway or Richet in mailing a letter in execution of a scheme devised by Conway and Richet in which defendant had no part? That is getting a long distance away from both the letter and the spirit of the law.

It is obviously going far beyond the bounds of reasonable intendment for the Court to say in effect that defendant was guilty if his co-conspirators caused to be placed in the postoffice for mailing and delivery one or more of the three letters or documents mentioned in the indictment. It is a substantial departure from the requirements of the law.

It does not appear that a conspiracy existed. It was not claimed at the trial, nor referred to in the evidence. No testimony was offered for the purpose of establishing a conspiracy. The Court assumed the existence of a conspiracy when he told the jury that it could make no difference, so far as defendant's guilt was concerned which one of the co-conspirators did the mailing, and that it was sufficient

if a co-conspirator caused one or more of the letters or documents to be mailed. He did not tell the jury that they must find the existence of a conspiracy as a fact but assumed its existence. This was error.

State vs. Hatcher 29 Ore. 309, 320; Dolan vs. United States 123 Fed. 54.

The Court in another part of the charge, reiterated the statement that the defendant need not have caused the letters to be mailed, to be liable when he said: "The question is * * * did he, or one of his co-conspirators place, or cause to be placed in the United States mail, or any station thereof for mailing and delivery, one or more of the letters described in the indictment for the purpose of executing or attempting to execute such scheme." (Record p. 159).

There is no case to be found in which the responsibility of a defendant is carried so far beyond the plain meaning of the Statute, as is attempted here in these instructions. The farthest that any Court has gone in fixing responsibility for placing articles in the mails is **Demolli vs. U. S. 144 Fed. 363**, in which the writer of a scurrillious article, who had it published in a newspaper, was held. The Court, however, laid great stress upon the actual knowledge of the defendant, holding that the evidence was sufficient to show that the defendant "**knowingly caused** the objectionable matter to be put in the mails." The whole argument of the opinion, in an endeavor

to justify its conclusion, is based on the actual knowledge of the defendant, and attempts the application of the doctrine of proximate cause, which was borrowed from the law of negligence for the occasion: "In the line of causation his act is a proximate cause of the objectionable matter being put in the mail." The dissenting opinion of Judge Hook is much better reasoned and is sounder logic. He deprecates the attempt to inject the doctrine of proximate cause into the criminal law.

In **Burton vs. United States** 142 Fed. 62, it was held that the defendant caused the letter to be mailed if by his authorization, knowledge and acquiescence it was done. In **Rumble vs. U. S.** 143 Fed. 781, it was objected that it was not shown that the defendant knew of the letter being written or sent. The Court said this objection would have been good if it was sustained by the facts. In the late case of **Hendrey vs. United States** 233 Fed. 5, 7, the matter mailed was a bank statement which the defendant caused to be published in a newspaper, copies of which were regularly sent to subscribers through the mails. The question as to the mailing was not raised at the trial, and the Court of Appeals took care to say that the mailing would be assumed, without intending to be decided; that the Court saw no occasion to look into the question which defendant had neglected to raise. In **U. S. vs. Kenofskey** 235 Fed. 1019 the defendant was charged with having devised a scheme to defraud an insurance company and using the mails in execu-

tion thereof. Pursuant to the scheme he handed certain false papers to the local superintendent at New Orleans to be forwarded by mail to the home office in Richmond. The defendant knew the documents would be sent by mail and intended that they should be. The Court in disposing of the contention that he should be held for the mailing said: "He is sought to be held on the theory that as he knew the claim would be mailed to the home office in the usual course of the business for approval before payment, he knowingly caused it to be deposited. This theory is too far fetched to be tenable."

In Samuels vs. U. S. 232 Fed. 540 it is said that the defendant must have caused the mailing knowing that it was for the purpose of executing the scheme.

No case, we believe, can be found that goes to the extreme length of holding that an accused can be said to have caused the mailing of a letter in the absence of knowledge that such letter was mailed, or of some direction on his part leading to the mailing of the particular letter. It would seem to be an anomaly to say that a person can be guilty of a crime that is committed without his knowledge, or without his having done some act to commit it. Crime is a personal thing. It is not unknowingly committed. Under Section 215 the offense is mailing the letter or other paper. One must then obviously do some conscious act which operates as a cause to place the particular document in the postoffice. The accused, under the plain terms of the statute must

either place the letter in the postoffice, or cause it to be placed there to be sent or delivered by the postoffice establishment. The intent to have the letter or document sent or delivered by the postal service is clear. It is personal to the person committing the act. It is impossible to comprehend how one could cause a document to be placed in the postoffice, and have an intent that such paper or letter be sent or delivered to an addressee, unless he did some conscious act to bring about the deposit in the postoffice of the particular letter which forms the subject matter of the charge. A penal statute such as this, is to be given a strict construction. A person charged with its violation should not be construed guilty. He should have the benefit of all reasonable intendments of construction, and not be compelled to meet such niceties of refinement in construing the act, as are necessary to hold that he is responsible for what a third person may do to cause a letter to be written and mailed.

If this instruction is to be held proper and as a statement of the law, why is it not just as logical and consonant with reason to say that one yet another degree removed from the accused may cause a letter to be mailed and the defendant be responsible, and so on to the nth degree. If it should be sufficient to say that his co-conspirators caused one or more of the letters to be placed in the postoffice, and he be responsible, there is no place where a halt can be

made, when the cause of the mailing is once away from the defendant.

The Trial Court went still farther afield and beyond the bounds of the statute when he said (p. 159): “It is sufficient * * * * that such letter or document was in fact **intended by the parties mailing it** in execution or to assist in the execution of the alleged unlawful scheme.”

It is clearly shown that defendant did not participate in the mailing of any of the indictment papers. If they were mailed at all, it was by some one else. Defendant did not know that they were deposited in the postoffice. The plain terms of the statute are, that the accused must mail the papers or cause them to be mailed for the purpose of executing or attempting to execute the scheme. This intention and purpose is personal to the defendant. To say that such intention can rest in another than the defendant, and the defendant be criminally liable is unthinkable. In all the cases decided under this statute it is nowhere said that the intent that the document mailed is for the execution of the scheme, can be the intent of any person other than the accused. No line of sound reasoning can place such intent or purpose away from the person of the accused.

It must be plain that, under this charge, the defendant could be convicted without any knowledge of the contents of the letters, or any knowledge that they were mailed, and without having mailed them, and without having caused them to be mailed, and

without any intent or purpose on his part that the letters were mailed for the purpose of executing the scheme. The letters might have been mailed by some one entirely outside the influence of the defendant, and the purpose of executing the scheme be personal to such person who did cause the mailing, and not to the defendant. This is, we think, going much further than the law contemplates.

XI.

Assignment 36. Government's Exhibit 122. Record Page 122.

During the cross-examination of C. R. Hibberd, a witness for defendant counsel for the prosecution produced a letter which the witness admitted having written. It was offered in evidence and received over the objection and exception of defendant.

The Court erred in admitting the letter. It was not competent evidence against defendant. It was not written to him, and he is not connected with it so as to be bound in any particular by its contents. It does not appear to have been answered and is merely an ex parte statement of one whose remarks made in a communication to Conway and not communicated to defendant cannot conclude defendant in the least. A similar communication was held improperly admitted in **Lemon vs. U. S. 164 Fed. 959**; and in **Parker vs. U. S. 106 Fed. 906, 910**. The evidence being affirmative matter produced during

cross-examination and not within the scope of his direct examination was not admissible.

Harrold vs. Oklahoma 196 Fed. 52; **Railroad Co. vs. Stimpson** 14 Pet. 448, 461; **Houghton vs. Jones** 1 Wall 702, 706; **McBride vs. U. S.** 101 Fed. 824! **Montgomery vs. Aetna Life Ins. Co.** 97 Fed. 916; **Ill. Cent. Ry. Co. vs. Nelson** 212 Fed. 52; **Balliet vs. United States** 129 Fed. 696, (concurring opinion of Judge Sanborn.)

XII.

Assignment 37. Exhibits 128-A and 128-B.

During the cross-examination of the witness Conway, counsel for the government produced a letter written to the witness by Ethel M. Brodhagen, dated July 27, 1910, and a carbon copy of the answer written by Conway. These letters were received in evidence over the objection and exception of defendant.

It is submittd that these letters were not competent evidence against defendant. Nothing was adduced to show any responsibility for them, or that he had any knowledge of or concerning them. If defendant is to be bound in any way by statements contained in letters it must first be shown that defendant had something to do with the answer. He must have written it, or consulted with Conway and advised writing the letter, or in some way have been connected with it. Without any connection with defendant it is inadmissible as against him.

The letters were written while the company was engaged on the Veason enterprise, and has no relation to the Union County project. It is inadmissible as having no relevancy to the matters concerning which the indictment letters were written. All that has been said about "Success" and the testimony of the rangers, is applicable to these letters.

It is not permissible for a written exhibit not related to the direct examination to be proved and offered in evidence by a party to a controversy during the cross-examination of an adverse witness. By doing so counsel for the government made Conway his witness and vouched for his credibility.

If the cross-examiner would investigate the subject covered by the letters, by the testimony of the witness he must make him his own witness and stand sponsor for the truth of his testimony. The rule has long been settled in the Federal Courts that the cross-examination of a witness must be limited to the matters stated in his direct examination. **Harrold vs. Oklahoma 169 Fed. 52**, and cases cited under assignment 36.

XIII.

Assignment 58. Pages 51, 184.

Defendant requested the Court to instruct the jury that:

"If the defendant believed the representations of the Oregon Inland Development Com-

pany with reference to the value of its lands to be true, he is entitled to an acquittal."

The Court refused this instruction and it is submitted that the refusal was error.

It was not shown by any evidence that the defendant had actual knowledge of the lands which were being advertised and sold by the company. The only evidence in this particular given was to the effect that he believed the lands to be what they were represented. Mrs. Dean testified for the government (p. 93), that the entire management of the business of the company was directed by Conway; that she thought the lands that the company was selling were good. She was told that they were. Mr. Riddell received the same information that she did, that Conway, Richet, Hibberd, the agents and everybody who had knowledge of the lands were loud in their praise.

Markillie testified (p. 63) Riddell knew nothing concerning the Veason lands except what information he got from either Veason or the witness.

C. R. Hibberd testified (p. 119) "Riddell understood that the lands were all first-class lands, suitable for fruit raising. He was told so by myself, Conway, Richet and others and had every reason for believing that the lands were as good as represented." Conway testified (p. 129), Riddell was told by Conway, Richet and Hibberd that the Union County lands were good fruit lands. He had no

knowledge of them other than what he got from us.” Defendant testified (p. 137): “I always believed that the lands in Union County were all that they were represented to be. I was told by Conway, Richet, Hibbard, J. T. Phy, T. O. Bird, J. D. Slater of La Grande, and others, that these lands were excellent in quality and well situated for fruit raising.

A number of affidavits were shown me signed by a number of the leading citizens of Union County in which these lands were stated to be good fruit lands. I never saw a tract of the land that the company purchased or had under contract. My entire knowledge came from what others said. I relied entirely on the integrity of Mr. Richet. I understood that Mr. Hibberd was a business man of excellent standing in Union County, and that any lands he might purchase would be good for the purpose. Mr. Phy, the present County Judge of Union County, said that Mr. Hibberd was an excellent judge of lands, and that he was reliable. I had no reason to suspect that these lands were other than what they were represented to be.”

No evidence was presented to the contrary, or to show that defendant had any personal knowledge of these lands, or that he believed them to be other than they were represented in the literature that the company put out. Good faith in the project is a good defense. **Harrison vs. United States 200 Fed. 665.** It is thoroughly well settled law that an honest intention, a belief in the integrity of the scheme is

an absolute defense. In the instant case, the whole framework of the government's contention is based on false and untruthful representations and statements made in the descriptive literature that was issued by the company, and the charge made in the indictment that defendant knew these representations to be false. If these allegations were not proved the government's case falls like a house of cards. If they failed to bring forward proof of this knowledge on the part of defendant he is entitled to a directed verdict. If there was evidence in the record showing defendant's want of knowledge of the lands, his reliance on others and his belief he was entitled to have the jury instructed that a verdict of not guilty should be returned if the defendant believed the representations made by the company as to its lands were true. These representations were the whole thing as to the scheme.

It is a maxim of the law as old as the common law that a party vouches for the credibility of any witness he produces, and is bound by the evidence brought out by his witness. Mrs. Dean, the government's witness testified concerning the belief of defendant in the good quality of these lands. This testimony must be accepted as correct. It refuted any knowledge on the part of defendant that the Union County lands were not suited for the purpose, and was evidence that defendant was not knowingly making false representations, when Conway issued the literature concerning the Grande Ronde Valley.

All the evidence as to the literature is that it was prepared by Conway. There is no evidence that the defendant prepared any of it, or that he knew the untruth of anything stated in it.

There is evidence produced by the government to the effect that he had no personal knowledge of these Union County lands, and believed them good. Based on this evidence, and also that offered by defendant, the Court was requested to instruct the jury. (Pages 50, 183):

“In order to be entitled to a conviction based on the literature circulated by the Oregon Inland Development Company, the government must show that the defendant caused this literature to be circulated, knowing that the statements contained in it, or some of them, were false in fact and that he did this with intent to deceive and to induce those receiving the literature to part with their money or property. The government must further prove that such misrepresentations were material.”

This request was refused, and its substance was not covered by the general charge, nor is it stated in the general charge that the defendant must have a knowledge that the lands advertised by the company were misrepresented. It was surely a matter of material moment that the defendant should have a knowledge that the property he is charged with misrepresenting was different from the representations made. The testimony of Mrs. Dean is persuasive that defendant's belief was honest, and that

he was unacquainted with the lands, relying entirely on others, from whom information as to their excellent quality came. The lack of evidence in the government's case that defendant knew the lands were poor, and unfit, coupled with positive testimony by the prosecution that the information conveyed to defendant was that the lands were splendid in quality and well within the representations, should entitle defendant to the instructed verdict asked for. It should at any rate require the Court to instruct the jury that the defendant must have had knowledge that the lands were illy suited for horticulture, and knowing such to be the fact, made the representations with intent to deceive.

Owing to the large number of exhibits that were admitted over objection, we have endeavored to group them as far as possible to save lengthy discussion. It is trusted that this brief presents the several questions to the Court fairly well, and it is submitted that upon due consideration the judgment of the District Court should be reversed.

E. B. DUFUR,

Attorney for Plaintiff in Error.

H. H. RIDDELL,

Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

H. H. RIDDELL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

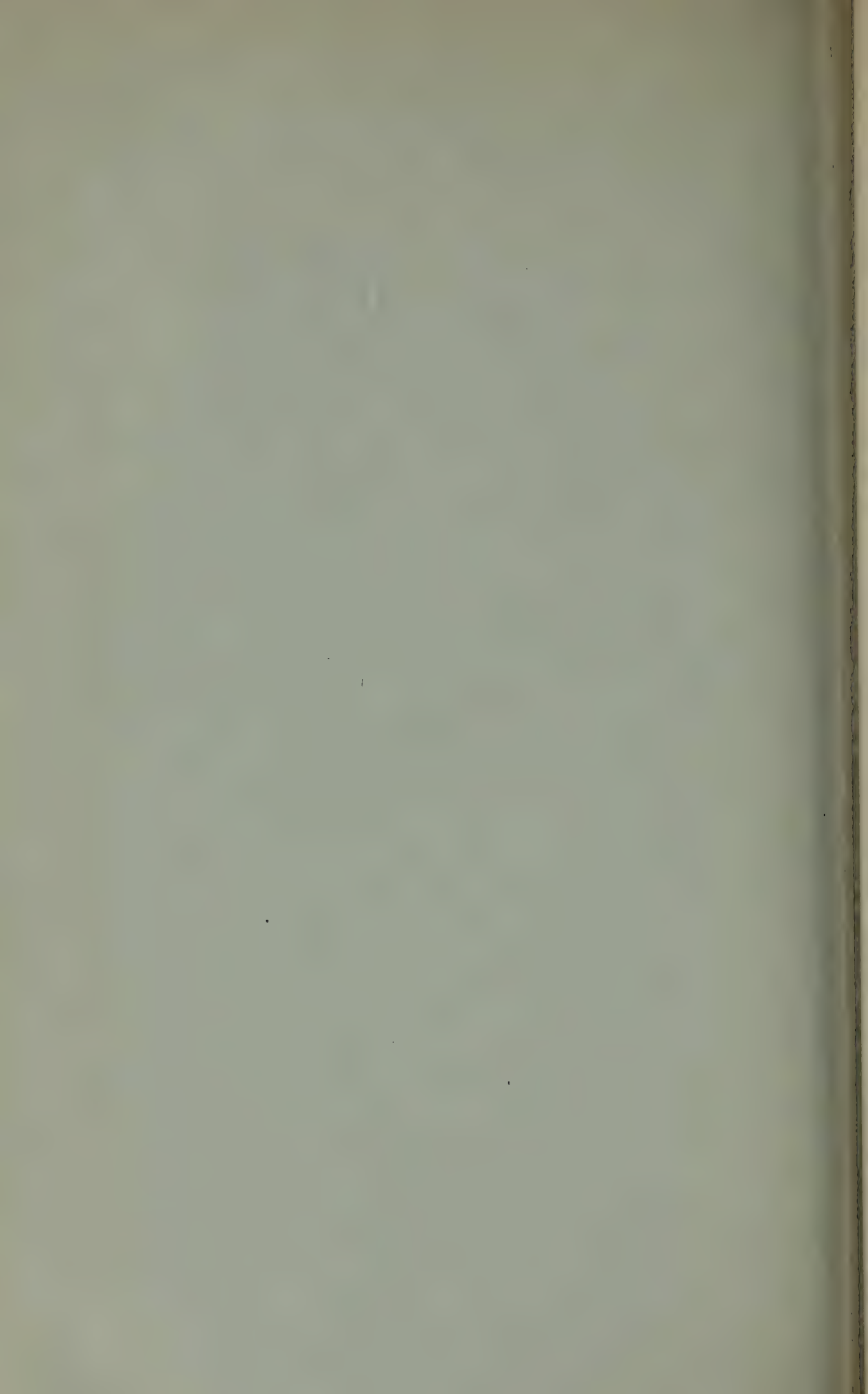
Upon Writ of Error to the District Court of the United
States for the District of Oregon.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

H. H. RIDDELL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE.

THE INDICTMENT.

(Transcript pp. 4 to 24.)

The indictment charges that Riddell, together with
Conway and Richet, his associates, having devised and

intending to devise a scheme and artifice to defraud Mrs. Patsey Doran, and divers other persons to the grand jury unknown, and to obtain from them and each of them money and property by means of false, fraudulent and misleading pretenses and representations, inducements and promises, which said scheme and artifice to defraud is hereinafter more specifically set forth and described, the said Riddell did knowingly, unlawfully and feloniously on July 12, 1911, at Portland, Oregon, place and cause to be placed in the postoffice at Portland, Oregon, and in the mails thereof and of the United States for the purpose of furthering and executing the said scheme and artifice to defraud, and for mailing and delivery, a certain letter set out in count one of the indictment;

And which said scheme and artifice so to defraud then and there being in and by the following means, methods, plans and modes, that is to say:

That the defendant, Riddell, together with the said Conway and Richet, his said associates acting personally and as officers of the Oregon Inland Development Company, an Oregon corporation, would falsely and fraudulently pretend, represent, promise and hold out to the said Mrs. Patsey Doran, and the said divers other per-

sons to the grand jury unknown and to the public generally:

a—That the said Oregon Inland Development Company was the owner of 40,000 acres of farm lands in the state of Oregon;

b—That the said defendant and his said associates and the said Company intended to and would subdivide the said 40,000 acres of land into 3,086 farms of the following price and size, to-wit:

2712 farms of ten acres each;

200 farms of 20 acres each;

150 farms of 40 acres each;

20 farms of 80 acres each;

2 farms of 160 acres each;

1 farm of 320 acres;

1 farm of 640 acres;

c—That the said company was the owner of 3,086 town lots in the townsite at Klamath Falls, Oregon, the county seat of Klamath County;

d—That the said defendant and his said associates and said company would sell one farm and one of said lots for the sum of \$240 payable \$10 down and \$10 per month until the full sum of \$240 should have been paid;

e—That the said 40,000 acres of land was by said company owned; was and is farm and fruit land of high quality, situated in sections 16 and 36 and located in the following named counties in the state of Oregon, to-wit:

Baker, Crook, Curry, Douglas, Grant, Harney, Jackson, Klamath, Lake, Linn, Lincoln, Malheur, Sherman, Union, Umatilla, Wallowa, Wasco and Wheeler;

f—That the said 40,000 acres of land so owned by said company were choice farm lands covered with sage brush and timber;

g—That in many cases the lands adjoining and contiguous to lands pretended by the said defendant and his said associates to be owned by the said company, were then being farmed and planted in orchards;

h—That the said lands so pretended to be owned by said company were also fruit and orchard lands;

i—That said company was the owner in fee simple of said 40,000 acres of farm land and of the said 3,086 town lots in Klamath Falls;

j—That the title of said company thereto was perfect and that any person purchasing the tracts offered for sale by said defendants and the said company would

receive good and sufficient title to said lands from said company.

And the defendant acting with his said associates did further falsely and fraudulently represent, promise, pretend and hold out to each and all of the persons hereinbefore mentioned and to the public generally:

a—That deeds to the said 40,000 acres of farm lands which vested title to said lands in said company had theretofore been executed by Veasen and wife.

That the said scheme and artifice so to defraud was to be further executed, carried out and effected by the defendants and his associates, and the company:

a—Increasing the price to be paid by the purchasers of said contracts of sale of said company from \$240 to \$300 each.

b—By falsely and fraudulently issuing, circulating, printing and distributing a certain illustrated booklet entitled, "Grand Ronde District, Oregon," which said booklet, among other things, contained a purported and pretended map and chart of Union, Wallowa and portions of Baker Counties, Oregon, and which said map of said counties had large portions thereof identified in red colors.

And the defendant and his associates, acting, as aforesaid, would and did further falsely and fraudulently pretend, represent, promise and hold out to the persons aforesaid, and to the public generally:

a—That each of said townships so on said map identified and outlined in red contained ten 20-acre tracts and farms owned by the said company;

b—That the most grave care had been exercised by the said defendant and his said associates acting as aforesaid in the selection of the said ten acre tracts owned and for sale by said company;

c—That the lands so claimed and represented to be owned by the said company in the counties of Union, Wallowa and Baker, aforesaid, were and are neither mountainous nor swamp lands;

d—That the said town lots so represented by them and by said company to be owned by it were a part of and contiguous and adjacent to the town and city of Klamath Falls, Oregon;

e—That each thereof was alone worth the amount of the selling price of the contracts of said company;

When in truth and in fact and as he, the said defendant, then and there well knew:

a—The said lands and lots so by defendant and his associates and said company pretended to be owned and claimed by said company at Klamath Falls, Oregon, were and are not at, in and a part of or contiguous or adjacent to the city and town of Klamath Falls, Oregon, but were and are situate and located elsewhere and are not of the value and amount at which the contracts of said company were sold and said lots were and are of little or no value whatsoever;

That the defendant and his said associates, in the execution and furtherance and as a part and portion of the scheme and artifice to defraud, would and did have printed and cause to be printed, published, circulated, mailed and generally distributed, large numbers of a certain poster, which said poster had written across it in bold red ink, "Grand Ronde District, Oregon," together with numerous half tone reproductions of photographs named, labeled and described by certain designations in the indictment;

Whereas, in truth and in fact and as the defendant well knew, the statements, labels and delineations, were false, fraudulent, misleading and untrue in every particular, and

Whereas in truth and in fact and as the defendant

well knew, the said pictures were taken upon lands not owned by said company and said pictures were false and untrue;

And whereas in truth and in fact and as the defendant then and there well knew,

a—The company was not the owner of 40,000 acres of farm land in the state of Oregon, nor the owner of 3,086 town lots at Klamath Falls;

b—The 40,000 acres of land so claimed to be owned by said company was not farm land or fruit land but was worthless land and unfit for orchard culture or cultivation;

c—The lands adjoining and contiguous to said lands pretended to be owned by said company were not capable of cultivation;

d—Neither the defendant nor the company was the owner of 40,000 acres of farm land or 3,086 town lots;

e—The deeds executed by John Veasen did not vest title to the lands in the company because the deeds were placed in escrow and were never delivered;

f—The townships designated in red on the map were false in this, that the company owned no lands in either Baker or Wallowa Counties, Oregon, and owned lands

in but six of the said townships designated in red;

g—The ten and twenty acre tracts advertised for sale by the circular entitled, "Grand Ronde District, Oregon," were not orchard lands of high grade and quality, but were worthless.

THE PROOF.

The defendant H. H. Riddell, a practicing attorney, was convicted in the United States District Court for the district of Oregon upon an indictment charging a violation of section 215 of the federal penal code. The defendant was the secretary and a director of the Oregon Inland Development Company, an Oregon corporation, during the entire existence of the corporation. There were three directors of the corporation—Frank Richet, who was also the president; and J. T. Conway, who was also the general manager. (See Corporation Minute Book Gov. Ex. 1 to 13 and 114.)

Prior to the date when the indictment against Riddell was returned Richet and Conway had been, in the same court and under similar indictment charging the same scheme to defraud, indicted, tried and convicted. (Tran. p. 130.)

Briefly, the indictment charges that Riddell, together with Conway and Richet, his associates, devised a scheme and artifice to defraud Mrs. Patsey Doran, and divers other persons to the grand jurors unknown, and the public generally, and to obtain from them and each of them

money and property by means of false, fraudulent and misleading pretenses, representations, inducements and promises. It is alleged in the indictment that the scheme to defraud of Riddell and his two associates, consisted in their advertising to the public that the corporation was the owner of 40,000 acres of land situated throughout the state of Oregon and of great value for agricultural and horticultural purposes; that these lands had been divided into 3086 farms as follows:

- 2712 farms of 10 acres each;
- 200 farms of 20 acres each;
- 150 farms of 40 acres each;
- 20 farms of 80 acres each;
- 2 farms of 160 acres each;
- 1 farm of 320 acres;
- 1 farm of 640 acres.

That the company was the owner of 3086 town lots at Klamath Falls, Oregon, and that the defendant and his said associates would sell one farm and one of said lots for the sum of \$240, payable \$10 down and \$10 per month until the full sum of \$240 had been paid.

It is further alleged in the indictment that many specific false representations were to be made by the defendants in the literature circulated by them, and par-

ticularly that pictures of lands were to be published upon the representations that the lands shown in the pictures were the lands the company was selling, and that they were of great value; the indictment charges in detail the names of the publications published and circulated by the defendant and his associates, and the specific false representations, inducements and promises alleged to have been made therein.

The indictment then proceeds to negative the truth of all of these representations and then alleges that the defendant, having devised the scheme and artifice to defraud, did knowingly and feloniously and for the purpose of executing the same, place and cause to be placed in the postoffice of the United States at Portland, Oregon, for mailing and delivery the several letters set out in the indictment. (Trans. pp. 4 to 24.)

The District Court sustained a demurrer to the sixth and seventh counts of the indictment and overruled the demurrer of the defendant interposed against counts one, two, three, four and five of the indictment. (Trans. p. 28.)

Following a trial the defendant was convicted upon counts three, four and five of the indictment. (Trans. p. 30.)

The bill of exceptions (Trans. p. 147) contains the following statement:

“The statement of evidence contained in this bill of exceptions does not contain all the evidence which was introduced at the trial, but it does contain all the evidence relating to the mailing of complainant’s exhibit 41, complainant’s exhibit 42 and complainant’s exhibit 119.”

These three exhibits constitute and are the letters set out in the indictment, each of which it is therein charged that the defendant either mailed or caused to be mailed for the purpose of executing the said scheme and artifice to defraud.

The company was organized in 1909 for the purpose of exploiting what are designated in the evidence as the Veasen lands. These lands, as the proof showed, were situated throughout the mountainous sections of Oregon, were widely scattered and were located in the school sections numbered 16 and 36. They were located on the tops of mountain peaks, were wild, uninhabited, uncultivated, unimproved, rocky, arid, and absolutely worthless for any purpose whatsoever. (Trans., pp. 93, 94.) They were the Jones-Mays lands and had already figured prominently in important land fraud trials tried in the federal courts of Oregon some years ago. (Trans. p. 144.)

The organizers of the corporation, as shown by the record of the minute book, claimed to have an oral contract with Veasen for the sale of these lands transferred this oral contract to the company in exchange and payment for the entire capital stock of the company. By these transactions the company became the owner of a contract to purchase a large area of worthless lands and issued all of its capital stock in exchange therefor. The defendant was a party to this transaction. (Gov. Ex. 1 to 13, 114, Trans. p. 134.)

The company then at once began to advertise these lands extensively and through the agency of the mails distributed great quantities of literature, in all of which it was falsely asserted that the company owned 40,000 acres of land and that these lands had great agricultural and horticultural value. A plan was offered to the public by which a home could be secured for the payment of \$240 payable in installments at the rate of \$10 per month. It was widely advertised that these lands had been, by the company, subdivided into the following number of farms:

- 2712 farms of ten acres each;
- 200 farms of 20 acres each;
- 150 farms of 40 acres each;
- 20 farms of 80 acres each;

2 farms of 160 acres each;

1 farm of 320 acres;

1 farm of 640 acres.

Under the plan advertised by the company an applicant might receive a farm of 10 acres and he might receive a farm of 640 acres, but the farms were to be all of the same value. (Gov. Ex. 12, 13, 15, 17, 18, 28.) A reading of the contract will show that its author carefully attempted to avoid the postal laws and regulations relative to lotteries. (Gov. Ex. 25.)

It was admitted at the trial that the company never did own 40,000 acres of land or have any contract for the purchase of anything like that amount of acreage. (Trans. pp. 121, 139, 140.)

As above stated there were but three directors of the company and the defendant was one of these directors and the secretary of the company. The company issued a great deal of literature and sent it out in enormous quantities through the mails. The literature carried the name of the defendant upon it as the secretary of the company. (Gov. Ex. 12 to 18, 28, 29, 30, 31, 32, 38.) It was kept in the office of the company and on the counter, the tables, the floor, in fact, it was stacked up all around the office. During the early part of the

history of the company the defendant was in the office of the company sometimes every day, sometimes twice a day, and sometimes once a week. He saw the employes of the company mailing the literature out to the public. As the defendant would come in to the office of the company the other officers would show him the literature they were sending out. (Trans. pp. 62 to 88.) The literature was printed by printing concerns in the city of Portland, and the defendant, as secretary, signed the checks which paid for the publications. (Trans. pp. 82, 83.)

As soon as a contract holder had been secured and the first payment made, the stenographer of the company would forward to the contract holder a written acknowledgment of the remittance and would request that the contract holder write for additional literature for himself and friends. (Gov. Ex. 16.) These written acknowledgments bore the stamp signature of the defendant, who upon various occasions, stood behind the stenographers and saw them filling the forms out for mailing and knew that they were being used. (Trans. p. 70.) Some of the literature was posted upon the wall of the offices of the company where the defendant examined it and commented upon it. (Trans. p. 82.) During a large portion of the time that the literature

was being sent out to the public the defendant had his law office adjoining the office of the company and maintained with the company a general reception room. (Trans., p. 85.) The defendant signed the contracts appointing the selling agents of the company, and also, as secretary, signed all of the clearance receipts in which it was certified that the contract had been fully paid up. (Trans. p. 74, Gov. Ex. 19) (Trans. pp. 76, 86, 147, 138, 139; Gov. Exs. 26, 40, 41, 42.) The stenographers in the employ of the company testified that the defendant knew that the literature of the company bearing his name as secretary was being sent out in large quantities through the mails. (Trans. pp. 66, 67, 69, 73, 78, 81, 82.)

A large number of witnesses who were contract holders of the Oregon Inland Development Company and who had been on account of the representations contained in the literature of the company, induced to purchase the auction contracts of the company, testified that they had received more or less of all of the literature of the company from the Oregon Inland Development Company and through the mails of the United States. (Trans. p. 100.)

The advertising literature of the company was false and untrue in two particulars:

First, the company did not own 40,000 acres of land, nor did it own anything like a sufficient amount of acreage to give to the contract holders the lands purchased by them under the auction contracts (Trans. pp. 121, 123, 139, 141, 147, 109) ;

Second, the lands of the company were not as advertised, and many of them were absolutely worthless. (Trans. pp. 94 to 98, 105, 106, 109, 115.)

Until the fall of 1910 the company owned no lands at all. It had a contract with John Veasen to purchase from him the worthless Veasen lands, but had paid nothing upon the contract. (Trans., pp. 60, 77, 139.) The company had collected from the auction contract holders over \$10,000 and had neither land nor money nor assets with which to redeem any of its contracts. (Trans. p. 116.) With affairs in this condition the company then entered into a contract with one C. R. Hibberd to purchase a large quantity of land situated in Union, Wallowa and Baker Counties, all in Oregon. The land was not described in the contract, which simply called for the purchase of approximately 17,000 acres of land. Hibberd did not even own the land which he was contracting to sell to the company and the best that can be said for this deal was that he testified that he intended to buy the lands for them. (Trans. pp. 118,

119, 139, Def. Ex. "E.") The contract holders who at that time held auction contracts to purchase the Veasen lands were notified by the company to surrender their contracts and they would be given in lieu thereof similar contracts calling for the purchase of lands in Union, Wallowa and Baker Counties. All of the contract holders then did this, and new contracts were issued to them in which contracts it was stated that the lands of the company would all be located in Union, Wallowa and Baker Counties in Oregon. (Trans. pp. 100, 101; Gov. Ex. 39.) The auction plan of the contract whereby a purchaser might secure a tract of 640 acres, or he might only get ten acres was still retained in the new plan. (Trans. p. 86, Gov. Ex. 39.) The contract holders were never notified that the company was insolvent or that the Veasen lands were worthless.

In addition to these transactions the company also sold a few tracts of land by a plan known as straight acreage under the terms of which the contract holder was promised a specific tract of land upon payment of the purchase price. (Trans. p. 121.) This feature of the operations of the company was not gone into or challenged by the government. (Trans. p. 117.)

During its existence the company sold 564 auction contracts, at a total sales price of \$137,565 upon which

contracts it received in cash \$62,189.70. Of the 564 auction contracts which it sold 184 of the auction contract holders paid up the amounts of the contract in full to the company. Of these 184 auction contract holders who paid out in full, six of them were transferred by the company to the straight acreage plan, leaving 178 auction contract holders, who paid out in full, and who received from the company absolutely nothing on account of their investments. These 184 contract holders who paid out in full, paid to the company \$38,755.94 in cash. (Trans. pp. 116, 117, 100.)

Out of the entire total of 564 auction contract holders the company transferred but 94 of these to the straight acreage plan. Of the 94 who were so transferred, but six had their contracts paid up in full at the time of the transfer and the most of them had made to the company but one or two payments of \$10.00 each at the time the transfer was made. (Trans. p. 117.)

At page 7 of the brief of plaintiff in error is contained the following statement:

“The bill of exceptions makes it appear (p. 205) that the government proved that these lands were not fit for agriculture or horticulture, but this is not an accurate statement. The draft of the bill of exceptions that the court signed was prepared by the United States attorney. Just why he saw

fit to omit the names of the witnesses who testified as to his contention concerning these lands we do not know. This statement was not discovered until this brief was being prepared. It is, however, not fair to defendant, and is not the fact."

It is true, as stated by the plaintiff in error, that the draft of the bill of exceptions signed by the Court was prepared by the United States attorney. A reference to the transcript discloses the interesting fact that while judgment was pronounced by the Court on March 20, 1916, the bill of exceptions was not signed by the Court until September 19, 1916. It became necessary for the United States attorney to prepare the bill of exceptions and in this respect to do the work which should have been done by the plaintiff in error. The bill of exceptions was drawn by the United States attorney because it was agreed upon between the parties that he should draw it. Before it was signed by the Court it was submitted to the plaintiff in error and to his attorney and expressly approved by both of them. The correctness of it has never been challenged by the plaintiff in error until he filed his brief, although, over four months elapsed between the date when the bill of exceptions was signed and the date when his brief was filed.

The statement contained in the bill of exceptions

and now for the first time objected to by the plaintiff in error, is a true statement of the facts occurring at the trial. If there is any doubt concerning this statement at all we respectfully suggest to the plaintiff in error that he file with the clerk of the Court a transcript of the testimony of the witnesses who testified on behalf of the government relative to the value and the location of the Union County lands.

ARGUMENT.

The defendant Riddell has alleged sixty separate assignments of error and in his brief has discussed these assignments in thirteen chapters. For convenience we will answer his brief in a like form, discussing his assignments in the order in which he has done so.

Assignments of error 2, 3, 19, 25, 26, 27, 30, 31, 42, 48, 52, 53, 54, 55, 56, 57 and 59 are not mentioned in defendant's brief and we may presume therefore that he has abandoned them and need not give them attention in argument.

I.

Assignment 1.

The defendant claims that the Court erred in overruling a demurrer to the indictment. The indictment was in five counts. The defendant was convicted on counts three, four and five. Count one sets forth in detail the scheme to defraud, and counts three, four and five each make reference to the scheme set forth in count one and by such reference make the same a part

of each of said counts. The indictment is attacked on the following grounds:

a—The scheme to defraud as alleged in count one does not allege an intent on the part of defendant to defraud anyone;

b—If such intent does appear in count one no such reference is made to it in counts three, four or five that will serve to carry forward any allegation of intent to defraud;

c—Counts three, four and five do not set forth the name of the person or persons to be defrauded.

The indictment charges in count one that Riddell together with J. T. Conway and Frank Richet, his associates, having devised and intending to devise a scheme and artifice to defraud one Mrs. Patsy Doran and divers other persons to this grand jury unknown and to obtain from them and each of them money and property by means of false, fraudulent and misleading pretenses, representations, inducements and promises, which said scheme and artifice to defraud is hereinafter more specifically set forth and described, he, the said Riddell, did knowingly, unlawfully and feloniously * * * deposit and cause to be deposited a certain letter in the mails for the purpose of furthering and

executing the said scheme and artifice to defraud and attempting so to do * * * and which said scheme and artifice so to defraud then and there being in and by the following means, methods, plans and modes, that is to say:

That the said defendant, Riddell, together with Conway and Richet, his said associates, acting personally and as officers of the Oregon Inland Development Company, a corporation, would falsely and fraudulently pretend, represent, promise and hold out to the said Mrs. Patsy Doran and to said divers other persons to the grand jury unknown, and to the public generally, that the said company was the owner of 40,000 acres of land, etc.

We need not repeat the details of the scheme as alleged as they appear heretofore in this brief in the description of the indictment, but it is sufficient to say that a reference to them will show that the representations, pretenses and promises as alleged are fraudulent on their face and it will further be borne in mind that the indictment states that the defendant intended by his representations to obtain money and property from Mrs. Patsy Doran and other persons to the grand jury unknown.

Counts three, four and five specifically refer to the scheme in the following language:

“That the said H. H. Riddell, together with one J. T. Conway and one Frank Richet, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of the false and fraudulent representations, pretenses and promises, set out in the first count of this indictment to which reference is hereby made and by which reference the said description of said scheme and artifice so to defraud is hereby made a part of this count three of this indictment, etc.”

The test of the sufficiency of an indictment of this kind we think has been well stated in the case of *Moffatt vs. United States*, 232 Fed. 522, 530:

“The crime here charged is made up of acts and intent, and this must be set forth in the indictment with reasonable particularity as to time, place and circumstance. The essential requirements—indeed, all the particulars—constituting the offense of devising a scheme to defraud are set out at length in this indictment and the *intent to defraud is manifest from the nature of the scheme itself*. This is sufficient. *Walker vs. United States*, 152 Fed. 111.

* * * It is contended that the intent to perpetrate the fraud must be alleged in the part of the indictment which follows the *videlicet*, and that it is not sufficient to allege it in the descriptive part of the indictment. This contention is without merit. It is sufficient if it is charged in any part of the indictment. * * * In an indictment for mailing a letter in execution or attempted execution of

a scheme to defraud in violation of this statute, if the scheme is *sufficiently outlined to show its design and adaptability to deceive* and fairly acquaint the accused with what he is required to meet, it answers the requirements of the statute. *Brooks vs. United States*, 146 Fed. 223. * * * The test to be applied is, not whether the material averments of this indictment might have been made more accurate and certain, but whether they plainly embrace in their terms both requirements of notice of the ultimate facts to be proved against the accused, and specification thereof which will leave no second prosecution open for the alleged offense. If these requisites are sufficiently stated it is the duty of the Court to uphold the indictment."

And such has been the holding in

Colburn vs. United States, 223 Fed. 590.

Gould vs. United States, 209 Fed. 730, 734.

Gardner vs. United States, 230 Fed. 575, 578.

Hendry vs. United States, 233 Fed. 5.

The intent may appear from the nature of the scheme itself.

Walker vs. United States, 152 Fed. 111 (9th Cir.).

Spear vs. United States, 228 Fed. 487.

It is not necessary to allege facts making it appear that the scheme on its face is fraudulent. It is sufficient

if it is reasonably calculated to deceive persons of ordinary comprehension.

Oesting vs. United States, 234 Fed. 304 (9th Cir.).

It would make no difference if the defendant devised the fraudulent scheme whether he was acting for the corporation or in his own behalf.

Oesting vs. United States (*supra*).

Though this indictment may not be technically perfect, we respectfully submit that it charges a violation of section 215 in substance, and is definite enough to give the defendant notice of the ultimate facts to be proved against him and to prevent the possibility of a second prosecution for the same offense.

It is contended by the defendant that even if count one does charge an intent to defraud there is not sufficient reference to count one in counts three, four and five to charge an intent to defraud in the last mentioned counts. We have quoted above from the language of the indictment the reference made in counts three, four and five to the scheme to defraud charged in count one. We think the reference made in the latter counts to the scheme to defraud charged in count one is sufficient to enable any reasonable man of ordinary in-

telligence to understand that the whole scheme to defraud is intended to be incorporated by reference in the latter counts, and this is sufficient.

Foster vs. United States, 178 Fed. 165, 171.

Crain vs. United States, 162 U. S. 625.

It is next contended that the indictment does not name the persons to be defrauded. The scheme as alleged was a general scheme to defraud and of course when first planned the names of the particular victims would not necessarily be in the minds of the defendant. As said in the case of Gould vs. United States, 209 Fed. 730, 735:

“Of course the defendants, when they devised the scheme to defraud set out in the indictment, if they did devise it for such purpose, did not know the names of the individuals who would be defrauded, and the grand jury in stating the scheme must state as the defendants understood it. We think the indictment sufficiently charges what is equivalent to a charge that it was the public generally which was to be defrauded.”

Such has been the holding in

Farmer vs. United States, 223 Fed. 903, 909.

Finnegan vs. United States, 231 Fed. 561, 564.

II.

Assignments 4 to 18, 29 and 32.

The defendant contends in these assignments that the Court erred in admitting certain evidence which related to the sale of lands in the "Veasen" project.

The indictment states that it was a part of the scheme to defraud that the defendant and Conway and Richet would falsely represent that the Oregon Inland Development Company was the owner of 40,000 acres of choice farm lands adaptable for orchard culture; that the company had good title to these lands which had been vested in it by virtue of a deed theretofore executed to the company by John Veasen and wife, and that these lands would be sold for the sum of \$240, payable in installments; that it was a further part of the scheme that the price to be paid by purchasers of contracts for the purchase of said lands was to be raised from \$240 to \$300 each.

In his argument on these assignments the defendant proceeds on the theory that the Veasen project had been abandoned more than three years before the indictment was found and that the letters charged in counts three, four and five of the indictment as having been mailed in pursuance of the plan to sell the Union

County lands had no bearing on the scheme to sell the Veasen lands.

As shown above, the indictment alleges a continuous scheme formed by Riddell and his associates to sell certain lands. The scheme was originally to defraud Mrs. Doran and other persons to the grand jury unknown, and the public generally, in offering for sale Veasen lands under false representations as to their character, and then offering them other lands in exchange, and raising the price from \$240 to \$300. The indictment alleges, and the proof shows, that this was all one continuous fraudulent scheme on the part of the defendant and his associates. (See statement of facts in this brief.)

The evidence here objected to was admissible for two reasons:

a—To show the existence of a continuous scheme to defraud the same people that varied not in its general plan to obtain money and property by means of false and misleading representations but only in the selection of bait to catch its victims;

b—To show the existence of an intent on the part of the defendant and his associates to defraud the persons named in the indictment, all the surrounding circum-

stances in connection with the defendant's business were admissible on the question of intent.

Samuels vs. United States, 232 Fed. 536, 541.

Sprinkle vs. United States, 141 Fed. 811, 816.

Shea vs. United States, 236 Fed. 73.

Stern vs. United States, 223 Fed. 762.

If it be held that this evidence was only admissible to show intent the Court properly limited the effect of the evidence in its instructions to the jury. (Trans. pp. 164, 165, 166, 155.)

Counsel devotes some argument in speculation as to how the jury would regard this testimony. If the defendant felt that more definite instructions should have been given with respect to this testimony as affecting the question of intent he should have requested the Court to so instruct the jury.

Moffatt vs. United States, 232 Fed. 522, 534.

The case of Marshall vs. United States, 197 Fed. 511, cited by defendant, is not in point. In that case the similar fraud proved was not alleged in the indictment as a part of the scheme. In the case at bar the indictment charges the sale of the Veasen lands as a part of the fraudulent scheme. Besides, this case has

been expressly limited and qualified in its application by the same court that rendered it in

Farmer vs. United States, 223 Fed. 903, 911.

III.

Assignment 13.

In the argument on this assignment objections are made,

a—To the admission in evidence of exhibit 16, which was a form letter, on the ground that the defendant Riddell's signature thereto was a stamp signature, and that there was no proof that he authorized the use of the stamp;

b—To the remarks of the court in admitting the said exhibit in evidence over objection.

The evidence amply justified the admission of this exhibit. The witness Ella O'Gara was a stenographer in the employ of the company; she testified that she had sent out a great number of copies of a mimeograph letter which is government's exhibit 16, which was a receipt for a partial payment by contract holders, and that Mr. Riddell had sat behind her several times and watched her filling in the forms so he naturally knew

they would be mailed. The signature of Mr. Riddell on this form was stamped. There is also testimony that at the time these receipts were being sent out Riddell knew that they were being sent out over his signature; that they were sent through the United States mails and were mailed at Portland (Trans. pp. 70. 71). It also appears in the evidence that Riddell signed many other similar form letters and also contracts which the company entered into.

There was no proper exception taken to the court's remark, the exception mentioned being only to the admission in evidence of the said exhibit (Trans. p. 71).

However, it is permissible for the trial judge in a federal court to comment on the evidence provided the facts and law justify such comment. The court directly stated that the evidence was only admissible as an inference to be drawn against the defendant and left the jury to say just what the inference was, if any (Trans. p. 71). Whatever inference the jury might have drawn from this statement, as to the court's idea of the guilt or innocence of the defendant was corrected by the instruction given charging the jury to disregard whatever opinion the court might have intimated as to the facts (Trans. 155, 156).

IV.

Assignment 28.

It is here objected that there was not sufficient evidence to connect the defendant with the mailing of the clearance receipts set forth in counts four and five of the indictment. The witness Fannie Dean was a stenographer in the employ of the Oregon Inland Development Company. She was shown the two clearance receipts set forth in counts four and five and asked through what agency they would be transmitted to the persons mentioned therein. She answered that the clearance receipts mentioned were first prepared by her and then taken to Richet and Riddell for their respective signatures and that after they had signed them the receipts would then be mailed to the persons therein mentioned. The defendant contends that the government was trying to show custom in doing business, and that this could not be done by testimony limited to these two particular papers.

We cannot see how this form of question could be prejudicial to the defendant. There had been testimony that the company had been sending out a large amount of literature with defendants named thereon and that this literature had gone through the mails and that the

defendant knew it; that he had signed numerous contracts as the secretary of the company; that form letters had been submitted to him for approval, which were also sent out to contract holders living at places distant from the office of the company. In fact, it had been shown that a large amount of the business of the company was done through the mails. Just before the testimony in regard to these particular certificates, the witness said that the form letters would be submitted to Mr. Riddell for approval (Trans. p. 88). This clearance certificate was a form in general use (Gov. Ex. 41, 42).

The testimony of the defendant himself shows the complete competency of this particular bit of evidence. He states that the clearance receipts were submitted to him before they were mailed; that they had to be signed by him before being mailed and that he knew that they would necessarily go through the mails to contract holders (Trans. p. 138).

The mailing of letters may be shown by evidence of the custom in the course of a man's private office and business.

Watlington vs. United States, 233 Fed. 247, 248.

Assignments 20 to 24, inclusive.

A number of pamphlets and booklets, exhibits 28, 29, 30, 31 and 32, were admitted in evidence over the objection of defendant. It was proven that this literature contained many glaringly false and untrue statements and representations as to the character and quality of the lands that the Oregon Inland Development Company was selling. (See statement of facts in this brief and reference therein to record.) The defendant contends that these exhibits should not have been admitted because there is no proof that the defendant knew of the falsity of the statements in the same. A remark of the court in connection with the admission of the pamphlet "Famous Fruits" (Gov. Ex. 29) is also claimed error.

a—The exhibits were properly admitted as tending to show that there was a fraudulent scheme. In offering proof of the scheme or artifice to defraud it has been repeatedly held by the federal courts of appeal that all surrounding circumstances in connection with the scheme are admissible to show its existence and the participation and intent on the part of the defendant. (Authorities are cited in consideration of this proposition under paragraph II, this brief).

b—J. T. Conway, as general manager of the company, got out this literature. Riddell, who had been an officer of the company since its creation, was one of the signers, as secretary of the company, of the contract by which Conway was employed as such general manager (Gov. Ex. 27). There was also abundant other evidence showing Riddell's close connection with the affairs and business of the company. (See statement of facts). In view of all this evidence the court properly admitted these pamphlets as a circumstance tending to show Riddell was knowingly participating in a fraudulent scheme.

The situation here is much like that in the case of *Kaplan vs. United States*, 229 Fed. 389, 390. The defendant there was convicted of having used the mails in furtherance of a scheme to obtain credit by means of a false financial statement. It was shown that the statement was prepared by a bookkeeper employed by Kaplan, which statement also contained the language,

“The above figures are correct to my knowledge, all the figures have been compared and investigated before the submission of this statement to you.”

Although it was shown that the bookkeeper prepared the statement and the defendant merely signed it, the appellate court held that this was sufficient to go to the

jury as to whether or not the defendant was responsible. The court said, in passing on this question,

“It was defendant’s duty, when he certified to the truth of these statements, to make the necessary investigation to enable him to do so honestly. It is not surprising that the jury declined to hold the bookkeeper solely responsible for the false statements.”

This testimony may not have been conclusive but it was relevant and with other facts and circumstances constituted convincing proof upon the subject.

Watlington vs. United States, 233 Fed. 247, 249.

Moffatt vs. United States, 232 Fed. 522.

c—The court very properly and quite emphatically limited the effect of this testimony in its instructions to the jury. (Trans. pp. 161, 163).

d—We may here call the court’s attention to the fact that there was no objection or exception taken to the court’s remarks in this connection, so far as appears in the record, although defendant, in his brief, argues such remark to be error. The objection and exception merely went to the admission of exhibit 29. (Trans. pp. 79, 80).

VI and VII.

Assignments 33, 34, 35, 45, 46 and 47.

These assignments are addressed to the admission in evidence over objection of the letter and two clearance certificates which are the basis of counts three, four and five and are set forth in full therein, and also to the refusal of requested instructions that the jury should find the defendant not guilty on these counts. It is contended by the defendant, as to the letter set forth in count three,

a—That there was no proof to connect the defendant with the mailing of said letter;

b—That the letter shows on its face that it was not relevant to the scheme described in the indictment.

As to the clearance certificates set forth in counts four and five it is contended that there was no proof that the defendant mailed or caused them to be mailed.

As to the letter set forth in count three, the defendant argues that it could not possibly be adapted to the furtherance of the scheme charged.

It will be difficult to fully argue this contention from the evidence appearing in the bill of exceptions as it is expressly stated therein that it does not contain all the evidence which was introduced at the trial, but does

contain all the evidence relating to the mailing of the letter and receipts above referred to. '(Trans. p. 147). However, we think that so much of the evidence as appears in the bill of exceptions shows that this letter as well as the receipts above referred to were a very material part of the fraudulent scheme.

The indictment alleges that it was a part of the scheme to falsely and fraudulently pretend, represent, promise and hold out to Mrs. Patsy Doran, to unknown persons, and the public generally, that the company was the owner of 40,000 acres of farm lands which would be subdivided into small tracts and sold for the sum of \$240 each, payable in installments; that the company was the owner of this land and that it was of a very high quality suitable for farm and fruit land; that it was a further part of the scheme to increase the price to be paid by the purchasers of contracts for sale of said lands from \$240 to \$300 each, and circulate booklets containing false and untrue descriptions of the lands they were exploiting.

The proof abundantly shows that when the company was first organized it exploited certain lands known as the Veasen lands, which were located mostly on mountain tops, falsely representing these lands to be farm and fruit lands of high quality. Later the com-

pany made a contract to purchase certain lands in Union County, Oregon, and then started an extensive campaign for the sale of these lands upon glaringly false representations as to their character, pursuing the same system of publishing and distributing handsomely lithographed maps, posters and pamphlets lauding in extravagant terms the adaptability of the lands for farm and fruit culture, claiming that these lands were located in Baker, Wallowa and Union Counties, although it was shown that the only land it contracted to buy was in Union County and that was not fitted for farm or fruit land.

At this time the company was also raising the price of the new lands which the company was exploiting from \$240 to \$300. (See statement of facts in brief.) Riddell was consulted relative to the raising of the price (Trans. p. 75).

W. C. Hayward was one of the holders of an original contract for the purchase of a tract from the Union County lands. He made a purchase for himself and one for his son on March 1, 1911, at the agreed price of \$240 for each contract. He completed his payments and paid in the full amount but never received his money or land or anything of value for the amount he paid. He identified the letter as one identical with the one he had re-

ceived at Manilla, Iowa, of date June 26, 1911 (Trans. 113, 114). If the proof above set forth constituted a scheme to defraud, then certainly this letter shows on its face that it was plainly in furtherance and in execution of such scheme. The letter states that Mr. Hayward would be given the opportunity of changing his contract to buy a tract for \$240 on the auction plan to a contract to purchase a specific tract at a price of \$300. As the lands which the company was offering to sell at \$300 as shown by the proof were hardly more adaptable for farming and fruit culture than were the Veasen lands, this letter was certainly sufficient to go to the jury as tending to show that the company and its officers were intending to defraud Hayward out of an additional \$60.00.

There was no proof that the defendant personally mailed this letter. Counsel contends that there is no evidence that he caused the letter to be mailed or set in motion the forces that led to its mailing. We have already shown in our statement of facts Riddell's close connection with this company from its very inception; that it was the custom to submit the literature and pamphlets of the company to him before they were sent out and that he signed all papers that required the signature of the secretary of the corporation; that all form let-

ters written were as a usual custom first submitted to him for approval. (Trans. pp. 88, 92.) They would be gotten up by Conway, who would write them generally in long hand and would be submitted to Richet and Riddell for approval after which they would be written up on the typewriter; then they would be sent out through the mails to all the contract holders. The defendant, in his own testimony (Trans. p. 138) admitted that form letters of the company were sometimes submitted to him for approval.

Counsel contends that the defendant could not have thought that the letter and receipts were mailed in furtherance of the scheme because he did not know that they actually were mailed. If the jury believed that the defendant collaborated in the preparation of this form letter which he must have known in the ordinary course of business would go by mail to various contract holders at points distant from the office of the company in Portland, then the jury should certainly be allowed to say whether or not Riddell was one of the persons causing this letter to be sent out.

Even if the defendant did not personally mail the letter and receipts if he contemplated that they should be mailed in the ordinary course of business and they were thereby mailed, he is responsible.

Shepard vs. United States, 160 Fed. 584, 593.

Watlington vs. United States, 233 Fed. 248.

Trent vs. United States, 228 Fed. 648, 650.

Bettman vs. United States, 224 Fed. 819, 828.

On the question as to whether the defendant can be held responsible for the mailing of a letter, in furtherance of a fraudulent scheme, by another, if he were a party to the fraudulent scheme which had contemplated the use of the mails, the court gave an instruction on that theory which was objected and excepted to by the defendant and this question will be considered under paragraph X in this brief.

It is also urged that there is not sufficient proof to connect the defendant with the mailing of the clearance receipts set forth in counts four and five of the indictment. Each of these receipts bears the defendant's own signature as secretary of the company. In his own testimony (Trans. p. 138) the defendant says that the clearance receipts were submitted to him before they were mailed, that they had to be signed by him before they could be mailed, that he knew that a large majority of the contract holders of the company lived in points outside of Portland, Oregon, where the company's office was located, and that as to them necessarily the clear-

ance receipts would go to them through the agency of the mails and would be mailed at Portland, Oregon; that if he had not signed the clearance receipts they would not have been transferred to the auction contract holders and that his signature was a part of the procedure by which the contract holder received his clearance receipt through the mails; that he read the clearance receipts before he signed them. There was also evidence to this effect by the witnesses O'Gara and Mrs. Fannie Dean, stenographers in the office of the company. This was surely enough evidence to go to the jury on the question of whether or not the defendant caused the mailing of these certificates. There is also further proof that E. H. Bryant and J. K. Hartline, the persons named in said certificates, respectively, each received his certificate through the mails.

It is also contended that if the defendant caused the letter and receipts to be mailed, the names of the parties whom he caused to mail them should be given. The case of *Simmons vs. United States*, 96 U. S. 360, is cited in support of this contention. However, this case was based upon an indictment for knowingly and unlawfully causing and procuring another to use a still in violation of law. We do not see how this case can be in analogy to the facts in the case at bar. Mailing and causing to

be mailed is in legal effect the same thing.

Shepard vs. United States, 160 Fed. 584, 593.

VIII.

Assignments 43 and 44.

These assignments related to the instructions of the court on the question of intent (Trans. pp. 162, 189). The defendant contends that the court took away from the jury the question of intent, and told them that if they found the defendant was a party to the scheme charged in the indictment and caused the mailing of the indictment letters he should be convicted regardless of whether or not he intended to do anything to injure or defraud anyone. It is claimed that the instruction had the effect of making the presumption of intent a conclusive one and of shifting the burden of proof on the defendant.

A review of the instructions given by the court will show them incapable of such construction.

Defining the meaning of a scheme to defraud, the court said:

“Now, to devise, within the meaning of this statute, means to prepare a scheme, to lay a plan, to contrive. A scheme is a design or plan formed

to accomplish some purpose. An artifice is an ingenious contrivance or device of some kind, and the term as used in this statute is equivalent to trick or fraud. To defraud implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something which he already has. Fraudulent pretenses, representations or promises within the statute mean such fraudulent suggestions or representations of an existing or past fact, or promise as to the future by one who knows it not to be true as are adapted to induce the person to whom they are made to part with something of value." (Trans. p. 153.)

At page 154 of the transcript the court charges the jury that the burden is on the government to establish to their satisfaction beyond a reasonable doubt that Riddell either on his own behalf or with the assistance of Conway and Richet, or one of them, devised the scheme to defraud, that he could not be convicted on mere proof that Conway and Richet devised the scheme, if they did, even if defendant knew of their conduct and failed to protest against it; that he could not be liable unless he knew that the scheme or enterprise was fraudulent and consciously participated therein, knowing it to be such; that however wide the mark the representations of Conway and Richet may have been the defend-

ant could not be charged with criminal responsibility for them unless he acted in bad faith, and the burden of proving that he so acted devolves upon the government.

Again at page 156 the court tells the jury that if the defendant Riddell was a party to the scheme or aided or assisted in his accomplishment with *knowledge of its fraudulent character*, then he would be guilty, and it would be the jury's duty to so find.

At page 157 the court again states that if the jury find that there was a scheme to defraud and Riddell was a party thereto he must have knowledge of its fraudulent character before being criminally liable.

Again, on the same page, the court tells the jury that if they can reconcile the testimony in the case upon the hypothesis of the defendant's innocence, it is their duty to do so.

Again, at page 160, the court says the intention of the defendant is the gist of the defense, that is to say, it must appear to their satisfaction and beyond a reasonable doubt, that he *intended to defraud* and in determining that question they should consider the testimony showing his connection with this corporation, his relation to it, the statements and representations, if any,

that were made to him by the officers and associates and promoters of the concern, and the motive, or want of motive, that may have induced him to engage or not to engage in such enterprise.

In the case of *McGregor vs. United States*, 134 Fed. 187, 196, which was a case involving a conspiracy to defraud the government, the court instructed the jury:

“If you find that the natural and necessary consequence of what they did was to defraud the United States, they are presumed to have intended that result; and they cannot be acquitted on the conspiracy counts because they may not have thought their acts and the result of such acts to be a fraud on the government. Where the act intended to be accomplished is a fraud, it is the intent to do the criminal act which imparts to it the character of an offense.”

It was contended by counsel in this case that the court by this instruction took away the element of intent from the jury, but the appellate court construing this instruction, together with others given by the court on the question of intent, said:

“The record thus discloses that the jury were, we may say, repeatedly charged by the court that the actual intention to defraud was an essential element of the crime, without which no offense could have been committed, and that, unless such intention was found by the jury from the evidence, the defendants should be found not guilty. As the

record makes the case, this additional instruction of the court was not intended to modify or set aside any of the instructions theretofore given, but was intended to *explain to the jury a method provided by law by which the jury might, from the evidence, find whether or not such intention existed.* It is well settled that the law presumes that every man intends the legitimate consequence of his own acts, and that such acts, when knowingly done, cannot be excused on the ground of innocent intent. In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts."

Agnew vs. United States, 165 U. S. 36, 49, 50.

We respectfully submit that no jury listening to these instructions given by Judge Bean, fair as they were to the defendant, could get the idea that the court was instructing them, as a matter of law, that the defendant intended to defraud or that the law presumed that he intended to defraud.

IX.

Assignments 39, 49, 50 and 51.

The court instructed the jury that it was not necessary for the government to prove the mailing of all the letters set out in the indictment; it was sufficient if

the jury was satisfied that one or more of such letters was mailed by the defendant or caused to be mailed by him and that such letter or document was in fact intended by the parties mailing it, in the execution of or to assist in the execution of the alleged fraudulent scheme. The defendant complains that by this instruction the jury was enabled to pronounce a verdict of guilty on all three counts on proof of the mailing of any one of the letters set forth in the indictment; that the defendant requested a separate instruction as to each of counts three, four and five, and that the court erred in not giving such instruction as requested.

This instruction does not carry with it the interpretation that counsel claims for it. A reading of the court's instructions at pages 151, 153, 155, 158, 159, 162 and 166, together with the instruction complained of does not convey any such construction. It will be noted also that the indictment is alleged in separate counts. The court of course is not bound to give its instructions in the language requested by counsel.

Besides, defendant was not prejudiced by such instruction even under the interpretation he claims for it. He was sentenced to serve a term of imprisonment of four months in the county jail and to pay a fine of \$2,500, which was no more than could have been im-

posed upon conviction under a single count.

Trent vs. United States, 228 Fed. 648, 650.

X.

Assignments 38, 40 and 41.

The court charged the jury that if they believed that there was a scheme or device to defraud by means of false or fraudulent misrepresentations charged in the indictment entered into between the defendant and Conway or Richet, and that such scheme contemplated the use of the mails in his accomplishment, it would make no difference as far as the defendant's guilt is concerned which one of the conspirators mailed the letters charged in the indictment, if they were mailed at all, or whether he knew that they were mailed or whether he had any knowledge of the contents thereof, if, in fact, they were mailed by one of the conspirators or associates in furtherance of the unlawful scheme or device to defraud, to which the defendant Riddell was a party and of which he had knowledge.

We submit that there was no error in this instruction.

The evidence connecting the defendant with the

mailing of the letter and receipts set forth in the indictment has been discussed in our brief under paragraphs VI and VII.

A scheme to defraud with acts to effect it has the aspects of a conspiracy.

Blanton vs. United States, 213 Fed. 320, 325.

Marrin vs. United States, 167 Fed. 951, 955.

If there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other, and this without the necessity of alleging conspiracy in the commission of the offense.

Belden vs. United States, 223 Fed. 726, 730.

Blanton vs. United States (*supra*).

Fitzpatrick vs. United States, 178 U. S. 304,
313.

If the letters were deposited in the mail pursuant to a scheme to which the defendant was a party, he is properly convicted even though he was not present when the letters were mailed.

Hume vs. United States, 118 Fed. 689, 698.

Rose vs. United States, 227 Fed. 357, 362.

If the letters were mailed by defendant's authorization or with his knowledge and acquiescence or was done by his partner in execution of their business enterprise, in legal contemplation the defendant caused the mailing to be done.

Burton vs. United States, 142 Fed. 57, 62.

It is not necessary in order to make it an offense to show that the defendant actually with his own hands placed non-mailable matter in a postoffice. If it appeared from the proof that it was done through his agency or direction by an employe or agent of the defendant employed and directed for that purpose, it was enough.

United States vs. Flemming, 18 Fed. 901.

United States vs. Bebout, 28 Fed. 522.

Richardson vs. United States, 181 Fed. 1.

XI AND XII.

Assignments 36 and 37.

These two assignments relate to the admission in evidence of two exhibits over the objection of the defendant, on the ground that they were incompetent, irrelevant and immaterial.

It has been held by federal appellate courts that this general objection is not sufficient for review:

Davis vs. United States, 107 Fed. 757.

Reilley vs. United States, 106 Fed. 905.

Steers vs. United States, 192 Fed. 1.

The first assignment relates to the admission in evidence of a letter written by one Hibberd who was then on the stand as a witness and was being cross examined by counsel for the government. He had testified on his direct examination that certain lands which were being offered for sale by the Oregon Inland Development Company were of a good character and contained good soil, and this letter indicated that at the time of writing the same he did not believe such to be the case. This was proper cross examination. As to assignment 37, Conway was a witness on the stand in behalf of Riddell and on direct examination testified that he had never examined the Veasen lands prior to October, 1910, and on cross examination was shown a letter dated July 27, 1910, and one dated August 2, 1910, exhibits 128-A and -B, which tended to show that he had made a statement to the contrary in one of said letters. This we contend is proper cross examination, at least for the purpose of tending to discredit the witness.

XIII.

Assignment 58.

Defendant requested the court to instruct the jury that

“If the defendant believed the representations of the Oregon Inland Development Company with reference to the value of its lands to be true, he is entitled to acquittal.”

The defendant complains that the court refused this instruction and that such refusal was error. We submit that the court, in its instructions, substantially gave the instruction requested by the defendant. (Trans. pp. 154, 155, 161, 163.)

The requested instruction did not take into consideration the evidence of the fact that the company did not own the lands it was selling and also the proof that the lands were not of the character represented, and the defendant's knowledge or lack of knowledge as to these matters.

A requested instruction is properly refused unless it ought to have been given in the very terms in which it is proposed. An instruction as to evidence which would have a tendency to divert the minds of the jury from the controlling effect which other proper evidence

may have on their decision, should be refused. The court may properly decline to give an instruction which would tend to mislead the jury. A request to instruct the jury upon the insufficiency of a part only of the testimony is objectionable.

Blanton vs. United States, 213 Fed. 320, 326.

CONCLUSION.

The Oregon Inland Development Company of which Richet was president, Conway general manager, and Riddell secretary—these three men constituting the entire board of directors—advertised to the world over their published names as such officers that the company was the owner of 40,000 acres of land; the evidence of the government showed that this statement was not true. They advertised that the lands owned by the company were agricultural lands and horticultural lands of great value; the evidence of the government showed that these statements were not true. They sent out advertising literature through the mails in large quantities upon which there were falsely portrayed scenes alleged to have been taken upon the lands of the company. Not only were these pictures false and untrue, but the company did not even own lands in the counties in which said pictures were taken. The pictures on the advertising literature which represented alleged scenes on the lands of the company in Baker County and Wallowa County were false and untrue because the company owned no lands at all in either of said counties. Throughout the existence of the company the contract holders

paid to the company at Portland, Oregon, through the mails, monthly remittances of \$10 each until they had paid in the full sum of \$62,189.70. Nothing of value was given to the contract holders in exchange or payment for the amounts of money they invested. There was no chance or opportunity for the investors to secure the much advertised farm of 640 acres or of 320 acres or of 80 acres, and the company did not own a sufficient amount of land to even give the contract holders the minimum allotment of ten acres each. The defendant who acted as secretary and director of the company, who maintained with the company a common reception room and saw and permitted thousands of copies of this false advertising literature going out to the people, has been justly convicted for his responsibility in this fraudulent enterprise.

We submit that the defendant had a fair and impartial trial and that the judgment of the district court should not be disturbed.

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Attorneys for Defendant in Error.

United States Circuit Court of Appeals

For the Ninth Circuit.

H. H. RIDDELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

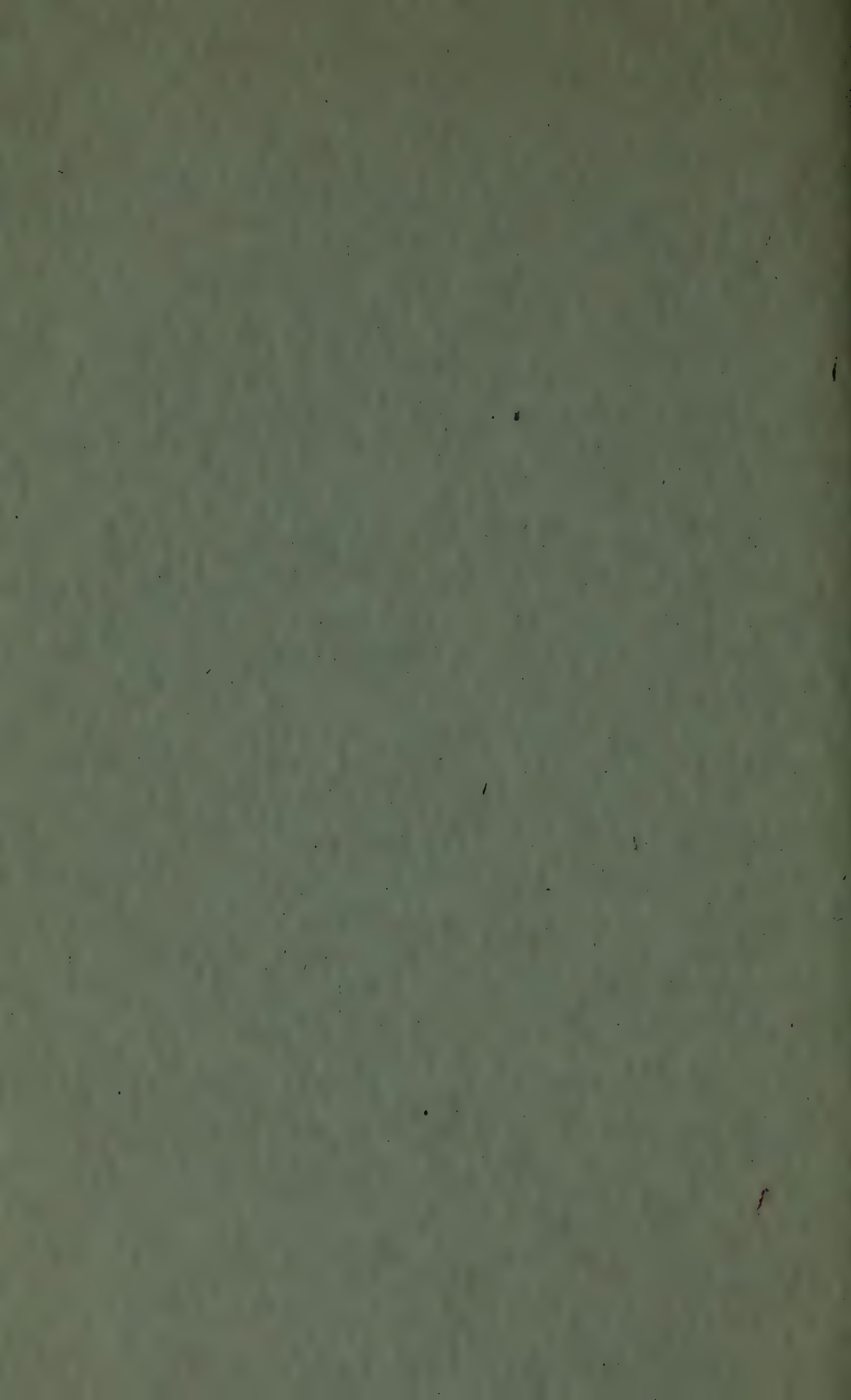
PETITION FOR REHEARING

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

Filed

SEP 4 - 1917

F. D. Monckton,
Clerk



PETITION FOR REHEARING

The Plaintiff in Error now comes and petitions the Court for a Re-hearing of the above entitled cause, for the following reasons:

The Court in its discussion of the indictment seems to have missed the point urged, that the failure to allege an intent to defraud is the particular in which the indictment is defective. The Opinion does not point out where any such intent is averred. Nor does the Court say that such averment may be dispensed with. This could not be well said, in view of the many instances in which an allegation of such intent is held to be essential. In fact the excerpt quoted in the opinion from *Samuels vs. United States*, 232 Fed. 536, expressly states that the fraudulent intent is one of the material allegations of the indictment. The necessity for such allegation is conceded, where the Court uphold the trial Court in admitting the evidence concerning the Veason lands upon the ground that it was admissible to prove intent. If it is necessary to prove a fraudulent intent on the part of defendant it is necessary to aver it in the indictment. It is elemental law that every essential element of the offense must be set out. No case that we have seen indicates that an averment of an intent to defraud on the part of the defendant may be omitted. The cases cited in the opinion in support of the indictment's sufficiency, do not sustain the point that an

allegation of intent to defraud may be omitted. On the contrary they are in clear antagonism to the Court's ruling. Thus in *Durland vs. United States*, 161 U. S. 309, there appears in the indictment a distinct allegation of an express intent to defraud. It is this case that the Supreme Court stated that "the significant fact is the intent and purpose." The indictment in *Oesting vs. U. S.*, 234 Fed. 305, contains the averment "with intent to defraud each and all of them." In *Walker vs. U. S.*, 151 Fed. 111, the question of the sufficiency of the indictment does not seem to have been considered. The opinion discussed the sufficiency of the proof. In *Spear vs. U. S.*, 228 Fed. 487, the indictment contained the averment "for the purpose of having said check or draft presented and collected for the use and benefit of themselves." This and other averments in the indictment were held to be sufficient to show the intent and purpose to convert the proceeds of the checks to their own use. In *Moffatt vs. United States*, 232 Federal 525, the indictment avers that "said proceeds would be converted to the use of said Moffatt." The Court say that "the crime here charged is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity," and further state that it is sufficient if the intent to perpetrate the fraud be set forth in any part of the indictment instead of in the videlicet as was contended, and further say: "His intent to defraud clearly appears from the language, 'that it was his intent to convert the proceeds of all sales

to his own use’,” and further, “it is alleged that it was his intention to defraud the persons named in the indictment.” The legal sufficiency of the indictment was not questioned by demurrer or otherwise in *Colburn vs. U. S.*, 223 Fed. 590. The opinion states, “The scheme is explicitly charged to have been fraudulent in its design and entered upon by the defendants for the purpose of defrauding any person,” etc.

Thus there is nowhere in the cases cited in the opinion any authority for the omission from the indictment of an allegation of an intent to defraud. They are authority for the necessity of such averment.

As maintained in the brief of Plaintiff in Error the indictment in the case here does not contain any allegation of an intent on the part of the defendant to defraud anyone. If it is not there, the indictment is defective in an essential particular. The brief of counsel for the prosecution does not point out where this material allegation can be found; nor does the opinion of the Court indicate where this essential averment appears. An exhaustive examination of the indictment itself does not disclose the allegation, but shows conclusively that it is not there, and that it would require a violent straining of the ordinary meaning of the language used to infer or imply such averment. But necessary averments cannot be supplied by inference or implication. Nothing is better settled than this. The whole

line of decisions of the Supreme Court have conclusively fixed the doctrine that no essential element of the offense can be omitted without destroying the whole indictment. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital.

If it was necessary, or even permissible, to spend the greater portion of the time taken at the trial of this case to offer evidence the sole purpose of which was to prove an intent to defraud, it must have been to prove some important element of the offense charged in the indictment. One would naturally be led to believe that such an averment was necessary. But when the opinion of the Court is found in effect stating that no allegation of an intent to defraud is necessary or even desirable, and that defendant can be proceeded against without an allegation, that all the Courts have held to be essential to a valid prosecution, and that the great mass of the evidence and testimony taken at the trial running through many days' time was proper to prove intent, which the Court say is not necessary to the case, it leaves us at sea as to what the law is. If the defendant is not entitled to demand that an intent be averred, he should be allowed to object to a great mass of testimony that was offered for the sole purpose of prejudicing the jury, and to have a ruling that such evidence be excluded, when its sole claim to admissibility rests on a ground that is not required

to be pleaded and for a purpose that does not find a place in the indictment.

We are not impressed with the consistency of the opinion of the Court. Either it must be held essential to aver an intent to defraud, or if not then the prosecution should not be permitted to use the term as a subterfuge for producing vast quantities of evidence that was admissible on no other ground. The opinion gives an undue advantage to the Government. It may omit an essential element from the indictment, and yet produce all the evidence it desires to prove that which it is not required to plead. If the proof is necessary, the pleading is essential. No opinion can be written that will stand unless it adheres to these principles. They are well founded in our legal system, and a decision that does not recognize them, instead of stating the law, will be merely a decision in opposition to the law.

The action of the trial Court in admitting the testimony and exhibits touching the Veason lands and their character is upheld on the ground that the acts of the Company and its officers in regard thereto were admissible upon the question of the intent with which their acts in regard to the Hibberd lands were performed. This evidence was not offered by the Government for the purpose of proving intent, nor admitted by the Court for such purpose; nor was the evidence limited to the acts of the Company and its officers

in regard thereto, but covered a much greater scope. It was offered and admitted for the express purpose of proving the substantive offense charged. At the time the pamphlet "Success" was offered in evidence the Court remarked in the hearing of the jury:

"There are two things that the Government must prove in this case: First, that there was a scheme to defraud. That is the preliminary question. And second, that the mails of the United States were used in furtherance of such scheme. The indictment alleges a particular scheme and this is evidence bearing upon that question."

"Mr. Reames: That is the purpose for which it is offered." (Record p. 66.)

And further on objection made by Judge McCamant to the introduction of some of this evidence the Court said: "As I said this morning, this is attempting to prove the fraudulent scheme" (p. 69). And again the Court said (p. 71): "I don't think a man can assume the duties of the office of Secretary and allow the literature to go out with his name signed to it without some inference being drawn against him." And later counsel for the Government, in offering some of this evidence, said: "Government now offers in evidence but one of these forms. I don't care to put the whole fifty-one in, and I will say at the time of making the offer, that we will supple-

ment that later in the trial by proof that several of them, of this identical form, were actually received by people who purchased applications and received at their post office addresses through the medium of United States mail. *It is offered simply for the purpose of proving a fraud and proving scheme and artifice to defraud and to connect the defendant therewith.*" And again the Court said when the second edition of "Success" was offered (p. 73): "As I have ruled two or three times, that is not the question now. The question is now whether the Government is able to prove there was a scheme to defraud. That is one question, the first one; the second is whether Mr. Riddell was a party to it, if there was such a scheme, and third, if to further this scheme the mails were used. And this is on the first two as I understand, and for that reason is competent. Especially in view that Mr. Riddell was consulted about the changes made before."

And again (p. 76) upon an objection having been made to a paper relating to the Veason lands the Court admitted it, saying, "Very well part of the transaction," and again the Court said: "But the evidence in this case up to this time indicates that this concern was organized for a purpose the Government claims is fraudulent, etc." and so on throughout the course of the trial, the Court and District Attorney were constantly urging this evidence on the attention of

the jury for the purpose of proving the substantive offense, not the one element of intent on the part of the defendant, but as an integral part of the scheme, and as the scheme itself. The jury were firmly impressed with the belief that this evidence was for proving the substantive offense itself, and as a fact based their verdict on that evidence. The Court may indulge in reasoning to any extent it pleases. It cannot get away from the fact that the minds of the jury were poisoned and the verdict of guilty induced by the evidence relating to the Veason lands, and their understanding that the defendant was criminally responsible for the acts of Conway Richet, Byrne and Markillie, done in 1909 and 1910, and that the Hibberd lands cut but small figure in the case. During the whole course of the trial no intimation was made by counsel for the Government, that this evidence was offered to prove intent. The Court did not admonish the jury that this evidence was to be considered by them for the purpose of proving intent alone, and we submit that after the jury had listened to this evidence for the greater part of the trial and had it impressed on them for days as evidence of the offense for which the defendant was on trial, it had every effect for which the prosecution could have wished. The partial limitation in the charge of the Court was too meager by far to limit it to the one question of intent. Indeed, the limitation did not have the effect of confining its effect

to the one question of intent. The Court said that the evidence concerning the Veason lands "has been admitted and is to be considered by you in order that you may ascertain and determine the nature and character of the business in which these people were engaged and whether or not it was a fraudulent scheme. * * * * You have a right, as I suggested a moment ago, to consider the entire transaction, the circumstances under which the corporation was organized, the purpose for which it was organized, how it was organized, how it was conducted, and *from that* determine whether they were carrying on an unlawful scheme to defraud in exploiting the Union County land." The scope of this evidence was thus enlarged to an extent that enabled the jury to find from the evidence of the Veason lands alone that the company was carrying on an unlawful scheme to defraud in exploiting the Union County lands. No wider scope could have been asked. It was not a limitation to the permissible use of establishing an intent. To have been admissible it must have been strictly limited to this one purpose. Authority is wanting for relaxing the rule as to the evidence of collateral facts, to any but the recognized exceptions. Where the facts offered consist of past misconduct, and are offered to show motive, intent or the like and are not relevant for such purpose they are obnoxious to the character rule and must be excluded. They do injury because they unduly prejudice the ac-

cused and the Court should scrutinize with great care the right to offer such evidence, because of the great harm that may be done by erroneous or over loose interpretation. It is a settled rule that the evidence must be confined to the point in issue, and in criminal cases there is a greater necessity than in civil causes to enforce this rule. *Austin vs. State*, 14 Ark. 559, *Wigmore Sec. 216, 300*. It is a dangerous species of evidence, because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason it is essential to the rights of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. *Com. vs. Shepard*, 1 Allen (Mass.) 581; *Commonwealth vs. Jackson*, 132 Mass. 16.

Courts have ever been careful in requiring that when evidence of collateral facts is used, it must be clearly shown to come within one of the recognized exceptions to the general rule excluding such evidence, and that it must be clearly limited to the specific purpose for which it is admissible.

The language of the instruction that this Veason evidence is to be considered in order that the jury might determine whether or not it was a fraudulent scheme, does not savor of a limitation to the one element of the intent of defendant. No construction of which the language is capable can carry a meaning which limits the application to the one question of intent. The jury did not so consider it, nor treat it as so limited.

In its opinion the Court makes the statement that if the defendant desired any more specific instruction upon the subject that each letter or paper mailed constituted a separate offense he should have taken an exception to the charge of the court at the time.

This portion of the charge was excepted to as clearly as is ever done at the trial of a cause. The record shows clearly as the certificate of the trial court can state it that the particular instruction was duly excepted to (record pp. 186, 187). From the language of the opinion this portion of the record was undoubtedly overlooked by the Court. A definite and specific instruction was called to the attention of the trial Court, who was requested to so charge the jury and to its refusal an exception was duly taken before the jury had retired (p. 179, 180 record). The Court was asked to instruct the jury that the defendant could not be found guilty under the third count in the indictment unless the jury shall find that

the defendant mailed or caused to be mailed a certain letter of date June 26th, 1911, signed Oregon Inland Development Company, J. T. Conway, Vice-President and General Manager, addressed to W. C. Hayward, Manila, Iowa, which letter is set forth in the third count of the indictment. A similar instruction was requested in writing as to each of the remaining counts four and five. Each of these instructions requested is correct as law, and no valid objection can be made to them. In view of these requests it is startling to have it intimated that a more specific instruction should have been requested, and can only be attributable to an oversight, for it is in the record as clearly as the certificate of the trial judge can make it. In *Boyd vs. United States*, 142 U. S. 457, the Supreme Court reversed the case because of the admission of evidence of collateral facts, which the Court held were erroneously admitted, and even though the instruction limiting the scope of the evidence was not excepted to at all. In view of this action by the Supreme Court, it is strange to find these correct requests for the very specific instructions intimated passed by with the statement that they were not made the subject of a proper exception.

We cannot perceive how the Court is able to assume that the jury understood the instructions that the defendant might be found guilty if he deposited, or caused to be deposited, but one

letter, did not mean what it said. Juries are supposed to be guided by the instructions of the Court. As to the first two counts the Court simply said: "You are to disregard them in your deliberations" (p. 151). As to the remaining counts he used the express language: "nor is it necessary for the government to prove the mailing of all the letters set out in the indictment, and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was mailed by the defendant, or caused to be mailed by him" (p. 186) and further (p. 187): "You must * * * be satisfied * * * that he placed, or caused to be placed, in the Post Office of the United States for mailing and delivery, one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention, for the purpose of executing such scheme." These instructions were duly excepted to, and the Court duly requested to charge that no conviction could be had on each of the three counts unless they should find that the defendant mailed or caused to be mailed the specific letter set out in such count. These requests were refused and the refusal was duly excepted to. This Court is not able to say that these instructions so given were not followed. It is not a usual thing for an appellate court to assume that an instruction of this nature would not be followed, or that it was intended to mean something other than what was

said. If the instructions of the Court are to be followed at all, how does the Court determine that they were obeyed in part and ignored in part? How can the Court say that the jury were properly guided by that part of the charge which was correct, and cast aside the instructions which were not in accordance with the law? This instruction, it will be observed, is a concrete direction to the jury that it is sufficient to convict if defendant was responsible for the mailing of one or more of the three letters or documents mentioned in the indictment. We submit that the determination of the Court does the defendant a manifest injustice, because it plainly declares the fact that his conviction was contrary to law.

The Court apparently passed over without consideration the exception to the instruction that the intention to defraud was conclusively presumed (record page 189). Much less conclusive instructions were held error in *Coffin vs. United States*, 156 U. S. 432; *Hibbard vs. United States*, 172 Fed. 66, 71; *McKnight vs. United States*, 115 Fed. 972; *Chaffee vs. United States*, 18 Wall 516; *Cummins vs. United States*, 232 Fed. 844; *Konda vs. United States*, 166 Fed. 93; *Melton vs. United States*, 120 Fed. 504; *People vs. Baker*, 96 N. Y. 340, 350, and the other cases cited in the brief of plaintiff in error. There can be no room to doubt the conclusive nature of the instruction excepted to, and as such it is obnoxious.

If the law were rightly administered no instruction to the effect that an intent might be inferred or presumed by the jury would be allowed. There are cases in which the intent may be inferred from the nature of the act, and others where willful intent or guilty knowledge must be proved, such as offenses involving a fraudulent intent. In such case a guilty intent is not to be inferred. Crimes of this nature constitute a distinct class in which the intent is not to be inferred from the commission of the act. *People vs. Molineux*, 168 N. Y. 297, 298. If intent is not to be inferred from the act itself, so as to warrant a departure from the general rule of criminal evidence and permit the admission of evidence of collateral acts to prove intent, then it was clearly error for the court to charge the jury that the intent to defraud the auction contract holders of the Oregon Inland Development Company upon the part of the defendant might be presumed. If an intent is to be presumed from the act itself, then no evidence can be required to prove it. In this case the rules were invoked to work with double severity against the defendant. Two-thirds of the evidence in the case was put in for the express purpose of proving the substantive offense, which is attempted to be justified on the ground of proving an intent to defraud on the part of defendant. It is in effect held that although so much evidence may be admitted to prove this intent, it is not necessary to plead it

in the indictment, and then after such a volume of evidence, admissible only to prove intent, and no pleading in the indictment of an intent to defraud, the Court goes further and instructs the jury that the intent may be presumed. Thus the important element of the intention of the defendant, is skilfully emasculated from the case, and a verdict of guilty obtained without the necessity of the jury making any finding as to this essential feature.

It is respectfully submitted to the consideration of the Court that a rehearing should be granted.

E. B. DUFUR,
Attorney for Plaintiff in Error.

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